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SUPREME COURT OF THE UNITED STATES
SUMMER TERM, 1979

MOTION FOR LEAVE TO
FILE PETITION

79-5010

ALPHONSE BIFULCO, PETITIONER

AGAINST

UNITED STATES OF AMERICA, RESPONDANT.

~~MOTION FOR LEAVE TO FILE~~ PETITION

FOR WRIT OF CERTIORARI: AND
PETITION FOR WRIT OF HABEAS
CORPUS

ON THE APPEAL:

ROBERT E. WINKLE
PEMBROKE STATION
DANBURY CT. 06810

SUPREME COURT OF THE UNITED STATES

SUMMER TERM

79-5010

RECEIVED
JUL 2 1979
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SUPREME COURT, U.S.

ALPHONSE BIFULCO,
APPELLANT

VS.

UNITED STATES OF AMERICA,
APPELLEE.

NO. 954 AUGUST TERM, 1979
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NOW comes the Appellant, Alphonse Bifulco, in accordance with rules 23 and 53 of the Supreme Court Rules, who deposes and says:

JURISDICTION

Jurisdiction is conferred upon this Honorable Appellate Court prusuant to Rule 19 of The Supreme court rules.

1. On January 14, 1979, Appellant Bifulco filed a Motion to Vacate Sentence in the United States District Court for The Eastern District of New York. On January 23, 1979, the Appellant's Motion was denied by that court. The Appellant timely filed his appeal in the Circuit Court for The Second Circuit, and on May 30, 1979 his appeal was denied by orde of that court. Copies of both opinions are hereto attached for the courts convenience.

2. Jurisdiction is conferred upon this court in accordance with Supreme court Rule 19 (1) (b), Title 28 U.S.C. 1651,2241,2243 and 2255

(a) Petitioner seeks to have the decission of the United States District Court for the Eastern District of New York, issued to the Appellant on January 23, 1979 by the Honorable Judge Costantion for that district, reviewed by this Supreme Court. The Decission of the District Court was upheld by the Second Circuit on May 30, 1979.

(b) No Motion for rehearing was filed withe the circuit court of appeals.

(c) The Statuatory provisions used to confer Jurisdiction on this court are the provisions of Title 28 U.S.C. 1651, 2241, 2243,2255. Also the fact that the sentencing court exceeded its jurisdiction to broaden the Statute of Title 21 U.S.C. 846.

(d) The Statutes involved in this petition are Title 21 U.S.C. 846 and Title 21 U.S.C. 841 (c).

(e) Petitioner was sentenced to Statute 846 concerning conspiracy to commit a substantive offense that is 841. The provisions under 841 (c) speciffically states that a special parole term can only be given to a convicte citizen if that citizen is convicted in violation of Title 21 841 or 845. The Statuatory provisions do not include Section 846 of that Title. Section 846 only carries as punishment for its violation " Fine, Imprisonment or Both".

(f) The questions presented herein are threefole. The first being whether any Doubt or Conflict must be interperted in favor of accused citizen insofar as Statute construction is concerned, and whether the court may arbitrarily broaden the statutes to meet its own ends. The second question for review is whether Strict construction of the statutes is Mandatory under the canons of Construction and mandated by this court. The third question is whether the Appellant is entitled to an opinion on the issues raised by him and whether the Circuit court has put itself in direct conflict with this Appeals Court .

(g) Jurisdiction of the Court of the first instance was conferred pursuant to Title 28 U.S.C. 2255.

(H) Petitioner relies on Rule 19 (1) (b) for his argument, to wit:

> Where a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by

this court; and has decided a federal question in conflict with the applicable decisions of this court.

The circuit court for the Southern District refused to discuss or rule on the claim brought by the appellant in the District Court. The Appellant feels he is entitled to a decission, because of the magnitude of the questions presented for review, and because of the impact the decission would have on thousands of prisoners, and pepple under the jurisdiction of federal parole officers.

The District Court and the Circuit court are in direct Conflict with the holdings of FASULO, PRUSSIAN, McBOYLE ANDSALEN, because the canons of construction demand Strict Construction where statutes are concerned, and the District Court and The Circuit court chose to liberally construe the statute at bar here and therefore, put itself in direct conflict with the decissions of this court.

WHEREFORE: FOR THE FOREGOING reasons, Appellant Bifulco asks this court to docket his petitiion for Certiorari and review this case. This Court has Never review the question presented herein, and has denied all Certiorari petitions presented thusfar. The mere fact that there is a Split among the Districts on this Question thus far, and there are Two cases on appeal in the Third Circuit should prompt this court to take the issue under advisement.

RESPECTFULLY SUBMITTED

Alphonse Bifulco

Alphonse Bifulco
Pembroke Station
Danbury ct. 06810

ON THE APPEAL:
ROBERT E. WINKLE
PEMBROKE STATION
BANBURY CT. 06810

Supreme Court, U. S.
FILED
DEC 13 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO,

Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 2, 1979
CERTIORARI GRANTED OCTOBER 9, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO,

Petitioner,

—v.—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

76 Cr. 822 and 79 C 148

UNITED STATES OF AMERICA

—*v.*—

ALPHONSE BIFULCO

EXTRACT OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/30/76	Before U.S. Magistrate Cattogio—Indictment filed, bench warrant ordered and issued.
1/7/77	Before Costantino, J.—Case called. Defendant present without attorney. Defendant arraigned and court enters plea of not guilty on his behalf. Bail set at $50,000 cash. Court appoints attorney for defendant and orders all motions filed by February 10, 1977. Trial set for February 28, 1977.
3/14/77	Before Costantino, J.—Case called. Defendant and attorney present. Trial ordered and begun, jurors selected and sworn. Trial continued to March 15, 1977.
3/30/77	Before Costantino, J.—Case called. Trial resumed. Jury returns with verdict of guilty as charged. Government motion to remand defendant denied as indicated. Jury discharged. All motions to be made on sentencing date. Sentence adjourned without date. Trial concluded.
6/3/77	Before Costantino, J.—Case called. Defendant and counsel present. Defendant sentenced for a period of four years and a special parole term of five years, and a fine of $1,000. Court grants defendant leave to appeal without prepayment of fee. Judgment and commitment filed, with certified copies to U.S. Marshal and Probation Department.

DATE	PROCEEDINGS

6/10/77 Notice of appeal filed.

12/27/77 Court of Appeals mandate dated December 15, 1977, affirming judgment of the district court, received and filed.

1/17/79 Defendant Bifulco's motion to vacate sentence pursuant to 28 U.S.C. § 2255 filed. Copy of docket entries forwarded to chambers.
Defendant Bifulco's motion for leave to proceed *in forma pauperis* filed.

1/22/79 By Costantino, J.—Memo and order dated January 19, 1979, dismissing the complaint, filed.

1/23/79 Judgment dismissing the complaint and denying petitioner's motion pursuant to 28 U.S.C. § 2255 filed.

1/29/79 Motion to proceed without funds *re*: 28 U.S.C. § 2255 petition and notice of appeal filed.

1/30/79 Motion to appeal *in forma pauperis* from denial of 28 U.S.C. § 2255 petition granted and notice of appeal filed. Copies of Docket sheets and notice of appeal forwarded to Court of Appeals.
By Costantino, J.—Addendum to January 19, 1979, decision, dated January 29, 1979, filed.

3/7/79 Record on appeal certified and mailed to Court of Appeals (28 U.S.C. § 2255 portion only).

6/28/79 Mandate of Court of Appeals affirming judgment, with copy of opinion *re*: 28 U.S.C. § 2255, received and filed. (Court of Appeals opinion dated May 30, 1979.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148

Criminal # 76-CR-822

COSTANTINO, J.

UNITED STATES OF AMERICA

vs.

ALPHONSE BIFULCO

MOTION TO VACATE SENTENCE

PETITIONER, ALPHONSE BIFULCO, envokes [sic] jurisdiction of the Honorable Court under Title 28 U.S.C. 2255.

That the petitioner was sentenced in the District Court on June 3, 1977 before the Honorable Judge Constantine [sic]. Petitioner was found Guilty at his trial of one count of Violation of Title 21 U.S.C. 846. Petitioner further states that he filed a Rule 35 motion to the court, which was denied by the Honorable Court on September 29, 1977. The petitioner now proceedes [sic] as follows:

Petitioner was charged in a multi count indictment with four (4) Co-defendants, including himself, who were finally taken to trial. [P]etitioner was originally charged with three (3) counts on that indictment, two (2) of the counts charged the petitioner with violation of Title 21 USC 841, and the third (3rd) count charging a violation of Title 21 USC 846. The petitioner went to trial, and the Jury returned a verdict of guilty on one (1) count of conspiracy under Title 21 USC 846.

The petitioner would like to state at this time that he was sentenced to four (4) years and a five (5) year Special Parole by the Court. Under the holdings of *Fassette* v. *U.S.*, 444 F. Supp. 1245, (1978), THAT he was indeede [sic] sentenced illegally.

The petitioner was sentenced to a four (4) year sentence with a three [sic] (5) year Special Parole to follow, as is allowed in Title 21 U.S.C. 841(a). However, the petitioner was sentenced illegally as he was found guilty of violation of Title 21 USC 846. Petitioner contends that, as in *Fassette supra*, the crime of which the petitioner was convicted was not a substantive of manufacturing or distributing, of which the petitioner was freed, as is punishable under section 841(a) but only a conspiracy to do these things. Such a conspiracy is not punished under Section 841(a) but under section 846. Such conspiracy is made a seperate [sic] offense under Section 846 and the punishment for such a conspiracy is seperately [sic] prescribed by 21 U.S.C. 846.

The punishment for substantive offenses punishable under 21 usc 841(a)(1) is the subsection set forth in the petitioners case. For the substantive offense involving P.C.P. the punishment is subscribed as a term of imprisonment not to exceede [sic] 15 years or $15,000.00 fine or both. The same punishment goes on to describe and provide that any Court imposing a term of imprisonment, shall also impose a special parole term of at least two (2) years. The operative language is as follows:

> "Any sentence imposing a term of imprisonment under this paragraph, shall . . . impose a special parole term of at least two (2) years *in addition* to such term of imprisonment. . " (ITALICS SUPPLIED)

So, if any imprisonment is imposed for the substantive offense, the Special Parole term is mandated in addition to the imprisonment. However, 21 USC 846 is quite different in its language. [T]his section in relevant part reads

> "Any person who conspires to commit any offense defined in this subchapter (which subchapter includes 841) is punishable by *imprisonment, or fine or both, which may not exceede* [sic] *the maxium* [sic] *punishment perscribed* [sic] *for the offense,* THE COMMISSION OF WHICH WAS THE OB-

> JECT OF THE . . . *CONSPIRACY*". (ITALICS SUPPLIED)

The clear meaning as the court interperted [sic] it, of 846, is that the punishment for 846, for violation of that section shall consist only of "imprisonment, fine, or both". A special parole term of the type perscribed [sic] in 841 is punishment in addition to imprisonment and or fine[.] Section 841 Speciffically [sic] refers to such special parole terms as something "In Addition" to imprisonment.

The court further went on to state that "a statute providing punishment for a criminal offense should be strictly construed.["] It cannot be doubted that a special parole term which follows a term of imprisonment is a significant additional detriment of and to the defendant. The court found no language tha[t] is in 846, which would permit any kind or type of punishment or detriment which is additional to fine or imprisonment or both. The court found no language in that section which wuld [sic] authorize imposing a special parole thereunder.

The words of 846 "Which may not exceede [sic] the maxium [sic] punishment perscribed [sic] for the (substantive) offense" modify the words "punishable by imprisonment fine or both". The court read the reference to the "Maxium [sic] punishment perscribed [sic] for the (substantive) offense" as referring to the maximum [sic] fine and imprisonment perscribed [sic] for the substantive offense. The court interpreted 846 as not permitting all of the types and kinds of substantive offenses and punishment for such offenses, but as permitting only fine and imprisonment which shall not exceede [sic] the maxium [sic] fine and imprisonment perscribed [sic] for the substantive offense.

If Congress had intended or so desired to have the permissable [sic] punishment for the conspiracy offense of 846 identical with that permitted for the substantive offense of 841, it could have easily and clearly declared it so. Instead, Congress had used language in 846 which seperately [sic] defines the permissable [sic] punishment for violations of that section and uses different language in defining it.

Further, the petitioner requests that this motion be granted in every respect.

CONCLUSION

Wherefore, since any doubt or conflict in the construction of the Statutes and rules must be resolved in favor of the petitioner, or since the District Court Lacked Jurisdiction to convict and sentence the petitioner, The petitioner prays that the information and indictment be dismissed; that the conviction be reversed; that the pleas be dismissed; that the Honorable Court issue Habeas Corpus forthwith, thus releasing the petitioner from his illegal restraint.

Respectfully submitted,

/s/ Alphonse Bifulco Pro-Se
ALPHONSE BIFULCO PRO-SE
Pembroke Station
Danbury Conn. 06810

Pursuant to Title 28 U.S.C. SECTION 1746, I declare under the penalty of perjury that the foregoing is true and correct. Executed on the 14th day of January, 1979.

/s/ Alphonse Bifulco
ALPHONSE BIFULCO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148
(76 CR 822)

ALPHONSE BIFULCO, PLAINTIFF

—against—

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM OF DECISION AND ORDER

Dated January 19, 1979

Filed January 22, 1979

COSTANTINO, D.J.

Petitioner was convicted pursuant to 21 U.S.C. § 846 of conspiring to violate 21 U.S.C. § 841(a)(1). He was sentenced to 4 years in prison with a 5 year special parole term. He now moves pursuant to 28 U.S.C. § 2255 to vacate or correct his sentence. The motion is denied. The court finds that defendant was properly sentenced. *See United States* v. *Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977) (5 years and 3 year special parole term); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975), *cert. denied*, 423 U.S. 1038 (1976) (7 years and 3 year special parole term). *See also United States* v. *Jacobson*, 578 F.2d 863 (10th Cir. 1978). Accordingly, the Clerk of the Court is directed to dismiss the complaint.

So ordered.

/s/ Mark A. Costantino
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148
(76 CR 822)

ALPHONSE BIFULCO, PLAINTIFF

—against—

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

Filed January 23, 1979

A memorandum and order of Honorable Mark A. Costantino, United States District Judge, having been filed on January 22, 1979, denying the petitioner's motion pursuant to 28 U.S.C. Sec. 2255, and dismissing the complaint, it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; that the petitioner's motion pursuant to 28 U.S.C. Sec. 2255 is denied; and that the complaint is dismissed.

Dated: Brooklyn, New York
January 23, 1979

/s/ Richard H. Weare
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

79 C 148
(76 CR 822)

ALPHONSE BIFULCO, PLAINTIFF

—against—

UNITED STATES OF AMERICA, DEFENDANT

ADDENDUM

Dated January 29, 1979

Filed January 30, 1979

COSTANTINO, D.J.

The eleventh line to the January 19, 1979 decision of this court should include a citation to *United States* v. *Burman*, 584 F.2d 1354 (4th Cir. 1978) following the citation to *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975), *cert. denied*, 423 U.S. 1038 (1976).

So ordered.

/s/ Mark A. Costantino
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of May one thousand nine hundred and seventy-nine.

Present: HON. MURRAY I. GURFEIN
Circuit Judge

HON. THOMAS J. MESKILL
Circuit Judge

HON. CHARLES EDWARD WYZANSKI
District Judge

79-2024

Filed May 30, 1979

ALPHONSE BIFULCO, PETITIONER-APPELLANT

—*v.*—

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO
/s/ Arthur Heller
By: ARTHUR HELLER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 954—August Term, 1978

(Submitted April 30, 1979 Decided May 30, 1979)

Docket No. 79-2024

ALPHONSE BIFULCO, PETITIONER-APPELLANT

—*v.*—

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

Before:

GURFEIN and MESKILL, *Circuit Judges*, and
WYZANSKI, *District Judge* *

Appeal *pro se* from an order of the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge*, denying motion for relief under 28 U.S.C. § 2255. The Court of Appeals held that the trial court neither lacked subject matter jurisdiction over appellant's conviction under 21 U.S.C. § 846 nor imposed an illegal sentence under that section.

Affirmed.

---

* Hon. Charles E. Wyzanski, Jr., United States District Judge for the District of Massachusetts, sitting by designation.

ALPHONSE BIFULCO, Danbury, Connecticut (Robert E. Winkle, Danbury, Connecticut, on the brief), *for Appellant Pro Se.*

EDWARD R. KORMAN, United States Attorney, Eastern District of New York, Harvey M. Stone, Rodney G. Smith, Assistant United States Attorneys, Eastern District of New York, *for Appellee.*

PER CURIAM:

This is an appeal *pro se* from an order of the United States District Court for the Eastern District of New York, Mark A. Costantino, *Judge*, denying appellant Alphonse Bifulco's motion for relief pursuant to 28 U.S.C. § 2255. We regard appellant's two claims on appeal as meritless and we affirm the order entered below.

Appellant was indicted on three drug-related counts, one count charging him under 21 U.S.C. § 846 with conspiracy to manufacture, distribute, and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. § 841(a)(1), and the other two counts charging him with substantive violations of § 841(a)(1). After a jury trial, appellant was convicted on the conspiracy charge and acquitted on the substantive charges. On June 3, 1977, he was sentenced to four years' imprisonment, a special parole term of five years and a $1,000 fine. This Court affirmed his conviction without opinion on December 15, 1977. Subsequently appellant, *pro se*, moved to vacate his sentence under 28 U.S.C. § 2255. The motion was denied by the district court and this appeal followed.

Appellant presents two claims for our consideration. The gist of the first argument is that the trial court lacked subject matter jurisdiction over his trial and conviction on the conspiracy count, in the absence of evidence proving a substantive offense as the object of the conspiracy, on the theory that no offense against the

United States had been proven. As this argument attacks the jurisdiction of the trial court, we will overlook appellant's failure to raise this objection in the § 2255 motion presented to the district court. Reaching the merits, we must reject appellant's argument as utterly without foundation. Congress explicitly defined conspiracy under § 846, standing alone, as a federal crime. A defendant need not be charged with any other violation in order to be tried and convicted under § 846. *See, e.g., United States* v. *Lyles*, 593 F.2d 182 (2d Cir.), *cert. denied*, 47 U.S.L.W. 3636 (U.S. Mar. 26, 1979). Moreover, a defendant charged with both a § 846 conspiracy and a substantive violation of § 841 may be lawfully convicted on the former and acquitted on the latter. *See, e.g., United States* v. *Lubrano*, 529 F.2d 633 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976). *See generally Callanan* v. *United States*, 364 U.S. 587 (1961) (noting distinctiveness of conspiracy to commit a particular offense and actual commission of that offense).

Appellant's second contention, which was raised below, is that the imposition on him of a special parole term, in addition to incarceration, is an impermissible expansion of the sentencing provisions of 21 U.S.C. § 846. We disagree.

Section 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by *imprisonment or fine or both* which may not exceed the *maximum punishment* prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(emphasis added). Appellant argues in his brief that the "maximum punishment" spelled out in § 846 refers to the maximum imprisonment or fine prescribed for violations of the substantive offenses covered by 21 U.S.C. § 841(b). He claims that the legislative history demonstrates a congressional intent to exclude the special parole mandated by 21 U.S.C. § 841(b). Therefore, he reasons, the addition of a period of special parole to his sentence of imprisonment and fine was an illegal sentence under 21 U.S.C. § 846. The only authority we have found that sup-

ports appellant's interpretation of the sentencing provisions of § 846 is *Fassette* v. *United States*, 444 F.Supp. 1245 (C.D. Cal. 1978). The *Fassette* court interpreted § 846 as "not permitting all of the types and kinds of punishment prescribed for the substantive offense but permitting only fine and imprisonment which shall not exceed the maximum fine and imprisonment prescribed for the substantive offense." *Id.* at 1247 (footnote omitted). The court's expressed hope that the Ninth Circuit would rule on the issue, *id.* at 1248, has gone unfulfilled.

The weight of authority is to the contrary. In *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 794-95 (2d Cir. 1976, *cert. denied*, 430 U.S. 917 (1977), and *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976), we gave our implicit approval to the type of sentencing challenged here without discussing or ruling on the claim raised by the appellant here. The Fifth Circuit in *United States* v. *De La Fuente*, 550 F.2d 309 (5th Cir. 1977), similarly gave its tacit approval to a sentence containing a special parole term for a violation of § 846 without considering the argument proffered here.

In addition, the two circuit courts that have directly addressed this issue have both rejected the reasoning adopted in *Fassette* and urged upon us here by appellant. In *United States* v. *Burman*, 584 F.2d 1354, 1358 (4th Cir. 1978), the court stated:

> We think that a special parole term for violation of § 846 was properly included in Burman's sentence. The conspiracy statute, § 846, is punishable by a sentence which must be set by reference to the penalties of the substantive offense statute. A special parole term is automatically made part of the sentence prescribed by the substantive offense statute, § 841(b), anytime imprisonment is included in the sentence. We think that under this statutory scheme such a special parole term is required as a penalty under § 846 when a sentence of imprisonment is imposed because the substantive [offense] statute, § 841(b), would so require it and the terms "imprisonment or fine or both" only have meaning by reference to the sentences imposed under substantive offense statutes. Because we do not find Burman's special parole term of fifteen years to be excessive, we hold that the position of a special parole term of fifteen years by the district court for violation of § 846 was proper.

The Tenth Circuit relied on a similar analysis in rejecting the interpretation pressed here by the appellant:

> From the wording in § 841(b)-(c), it would appear that Congress viewed the special parole term as being a part of the term of imprisonment to which it was appended. Paragraphs (1) to (3) of § 841(b) all make a special parole term mandatory whenever imprisonment is also imposed. Thus, a parole term may never be imposed without imprisonment; it must always accompany imprisonment. Section 841(c) provides, in addition, that violation of the special parole may result in an increase in the original term of imprisonment to the extent of the length of the special parole term. It is impossible, therefore, to accept the argument that the parole term is to be imposed only where the charge is violation of the substantive provision. It is logical to view the reference to imprisonment in § 846 as intending to incorporate all of the imprisonment provision in § 841(b).

United States v. *Jackson*, 578 F.2d 863, 868 (10th Cir. 1978).

We note too that in a closely analogous case, *United States* v. *Dankert*, 507 F.2d 190 (5th Cir. 1975), the Fifth Circuit upheld the imposition of a special parole term in addition to imprisonment under 21 U.S.C. § 963. Section 963 prohibits conspiracy to import, rather than manufacture, controlled substances; the corresponding substantive sections, §§ 952(a)(1) and 960(b)(1), punish the actual importation of these substances, and as such, they are companion sections to the substantive offense section involved in the instant appeal. In *Dankert* the appellant made the argument, similar to that advanced

by appellant Bifulco, that § 963 does not include the special parole term provision of § 960(b)(2). Section 963 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by *imprisonment or fine or both* which may not exceed the *maximum punishment* prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(emphasis added). The *Dankert* Court rejected the interpretation proffered by appellant:

> The punishment provision of § 963 must be considered in light of §§ 952(a) and 960, since it is these statutes which define the offense which was the object of the conspiracy, and provide for punishment therefor. They provide:
>
> § 952(a) It shall be unlawful to import . . . [certain] controlled substance[s] . . . .
>
> * * * *
>
> § 965(a)(1)
>
> Any person who—
>
> contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,
>
> * * * *
>
> shall be punished as provided in subsection (b) of this section.
>
> § 960(b)(1)
>
> In the case of a violation under subsection (a) of this section with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.
>
> * * * *

> We have no trouble whatever in understanding the language of § 963 to permit pnishment not exceeding that provided for an offense in violation of § 952(a).

Id. at 191.

We agree with the position taken by the Fourth, Fifth and Tenth Circuits on this issue. Therefore, we affirm the order of the district court denying appellant's § 2255 motion.

SUPREME COURT OF THE UNITED STATES

No. 79-5010

ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 9, 1979

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Cir. D

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No. 79-5010

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DePUE
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Department of Justice
Washington, D. C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 79-5010

ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. IV, 1-8) is reported at 600 F.2d 407.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 1979. The petition for a writ of certiorari was filed on July 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

21 U.S.C. 841(b)(1)(B) provides in pertinent part:

> In the case of a controlled substance in Schedule I or II which is not a narcotic drug or in the case of any controlled substance in Schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000 or both. * * * Any sentence imposing a term of imprisonment, under this paragraph, shall, in the absence of a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

21 U.S.C. 846 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

QUESTION PRESENTED

Whether a special parole term may be imposed as part of the sentence for conspiracy to distribute a controlled substance under 21 U.S.C. 846.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of conspiracy to manufacture, distribute, and possess with intent to distribute phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. 846.[1/] Petitioner was sentenced to four years' imprisonment to be followed by a five-year term of special parole, and a $1,000 fine. The court of appeals affirmed by judgment order (Pet. App. I).

Petitioner thereafter filed a pro se motion to vacate his sentence under 28 U.S.C. 2255, claiming that the sentence was unlawful because a term of special parole may not be imposed under 21 U.S.C. 846. The motion was denied by the district court (Pet. App. III), and the court of appeals affirmed (Pet. App. IV).

DISCUSSION

The issue presented in this pro se petition (Pet. 2-3) is of substantial importance to the administration of criminal justice because of the significant role of the special parole term in the rehabilitation of drug offenders and because of the large

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1/ Petitioner was acquitted on two other counts charging him with substantive violations of 21 U.S.C. 841(a)(1) (Pet. App. IV, 2).

number of drug conspiracy offenders who have been given special parole terms during the decade that the Comprehensive Drug Abuse Prevention and Control Act has been in effect. The courts of appeals are divided over whether a conspiracy conviction can constitute a predicate for imposition of a special parole term. Although we believe that this issue was correctly decided against petitioner, we do not oppose his petition for a writ of certiorari in light of the conflict among the courts of appeals.

1. Of the six circuits that have addressed this issue, five have held that a sentence imposed under Section 846 for drug conspiracy must include a special parole term whenever such a term would be mandated for commission of the underlying substantive offense. In addition to the Second Circuit's decision in this case, the Fourth, Fifth, Eighth, and Tenth Circuits have upheld the imposition of special parole terms for drug conspiracy offenses. See United States v. Sellers, No. 79-1107, slip op. 11-14 (8th Cir. Aug. 7, 1979); Cantu v. United States, 598 F.2d 471, 472 (5th Cir. 1979); United States v. Burman, 584 F.2d 1354, 1357-1358 (4th Cir. 1978); United States v. Jacobson, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978); see also United States v. Dankert, 507 F.2d 190, 191 (5th Cir. 1975) (sustaining imposition of a special parole term under the drug importation conspiracy statute 21 U.S.C. 963, which contains language identical to that in Section 846).[2/]

2/ In Timmreck v. United States, 577 F.2d 372 (6th Cir. 1978), reversed on other grounds, No. 78-744 (May 4, 1979) the Sixth Circuit assumed that it was necessary to add a term of special parole to a sentence of imprisonment for a drug conspiracy conviction under Section 846. 577 F.2d at 373. In reversing that court's holding that failure to inform the defendant about the mandatory special parole term upon accepting his plea of guilty to the conspiracy offense justified collateral relief under 28 U.S.C. 2255, this Court also assumed that special parole was "required by the applicable statute." United States v. Timmreck, supra, slip op. 2 & n.2. Special parole terms have regularly been upheld, albeit without specific consideration of this issue, in connection with drug conspiracy convictions in other cases as well. See e.g., United States v. Moreno, 569 F.2d 1049 (9th Cir.
(Footnote continued)

The Third Circuit stands alone in holding that a special parole term may not be imposed as a penalty for a drug conspiracy offense. United States v. Mearns, 599 F.2d 1296 (3d Cir. 1979). The court reasoned that Section 846 provides that conspiracy is punishable "by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy"; that "imprisonment or fine" does not include a special parole term; and that therefore no special parole term may be imposed under Section 846. Accord, United States v. Jacquinto, 464 F. Supp. 728, 729 (E.D. Pa. 1979); Fassette v. United States, 444 F. Supp. 1254, 1247-1248 (C.D. Cal. 1978).

2. We submit that the court of appeals in this case was correct in concluding that the Comprehensive Drug Abuse Prevention and Control Act contemplates imposition of a special parole term upon conviction for a drug conspiracy offense whenever such a term is mandated for the substantive offense, and that the contrary holding of the Third Circuit in Mearns was erroneous. The very structure of the Act evidences a plain purpose on the part of Congress to make the penalties for conspiracy co-terminous with those for substantive offenses. Congress created a single conspiracy provision and incorporated by reference therein various sentencing provisions set out in the sections of the Act that define substantive offenses (21 U.S.C. 841-845). No effort was made to reiterate the resultant complex penalty structure in the conspiracy section itself, and thus little can be inferred from the failure of Section 846 to reflect the full range of sentences that may be imposed under the Act.

(continuation of footnote)
1978); 434 U.S. 940 (1977); United States v. De La Fuente, 550 F.2d 309 (5th Cir. 1977); United States v. Armedo-Sarmiento, 545 F.2d 785, 794-795 (2d Cir. 1976), cert. denied, 430 U.S. 817 (1977); United States v. Wiley, 519 F.2d 1348 (2d Cir. 1975); United States v. Rich, 518 F.2d 980, 986-987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976).

In any event, it does not seem proper that persons convicted of drug conspiracy offenses in some circuits should be subject to mandatory special parole terms, while those convicted of the same offense in another circuit are not. Accordingly, we believe that the conflict among the circuits on this issue is one that should be resolved by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1979

FOR ARGUMENT

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (A.11)[1] is officially reported at 600 F.2d 407. The opinion of the district court (A.7, 9) is not reported.

JURISDICTION

The judgment of the court of appeals (A.10) was entered on May 30, 1979. The petition for a writ of certiorari was filed *pro se* on July 2, 1979, and was granted on October 9, 1979. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

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[1] "A." references are to pages of the Appendix filed in the Court.

QUESTION PRESENTED

Whether the inclusion of a special parole term in petitioner's sentence for violating the federal drug conspiracy law, 21 U.S.C. §846, was authorized, where the statute specifies punishment of "imprisonment or fine or both" and does not refer to the special parole term required for certain substantive drug violations.

STATUTES INVOLVED

TITLE 21, UNITED STATES CODE

§841. Prohibited Acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) * * *

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provisions of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant

or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

* * *

(c) Special parole term

A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

(P.L. 91-513, title II, §401, Oct. 27, 1970, 84 Stat. 1260.)

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(P.L. 91-513, title II, §406, Oct. 27, 1970, 84 Stat. 1265.)

STATEMENT OF THE CASE

Petitioner Alphonse Bifulco was charged, in a one-count indictment filed in the United States District Court for the Eastern District of New York, with conspiring to violate 21

U.S.C. §841(a)(1) in violation of 21 U.S.C. §846.[2] It was alleged that the conspiracy was formed to manufacture, possess, and distribute phencyclidine, a Schedule III controlled substance. Petitioner and his co-defendants were tried before a United States District Judge and a jury, and on June 3, 1977, pursuant to a verdict of guilty against him, petitioner was sentenced to a term of imprisonment of four years, a fine of $1,000, and a term of special parole of five years (A.1). On December 15, 1977, the court of appeals affirmed the judgment in all respects (A.2).

By a *pro se* motion to vacate sentence, brought under 18 U.S.C. §2255 and filed on January 17, 1979 (A.3), petitioner contended that the inclusion of a special parole term under his conviction for conspiracy was unlawful in that 21 U.S.C. §846 authorizes only "imprisonment or fine or both" and does not authorize the additional punishment of special parole.[3]

The district court denied the petition in a memorandum filed January 22, 1979 (addendum filed January 30, 1979), holding that special parole was properly included in petitioner's sentence[4] (A. 7, 9).

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[2]A copy of the indictment is annexed to petitioner's brief as Addendum I. Examination of this document reveals that the court of appeals below was incorrect in describing (A.12) the indictment against petitioner as consisting of three counts, a conspiracy count and two substantive counts; and the court was also incorrect in stating that petitioner was acquitted of the two substantive counts. In actuality, petitioner was charged only with conspiracy.

[3]In support of his position, petitioner cited *Fassette v. United States*, 444 F. Supp. 1245 (C.D. Cal. 1978), which held special parole not to be a proper component of a sentence under 21 U.S.C. §846 (A.4-5).

[4]The district court cited the following cases in support of its ruling: *United States v. Burman*, 584 F.2d 1354 (4th Cir. 1978), *cert. denied*, 99 S.Ct. 1026 (1979); *United States v. Jacobson*, 578 F.2d 863 (10th Cir.), *cert. denied*, 439 U.S. 932 (1978); *United States v. Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976), *cert. denied*, 430 U.S. 917 (1977); and *United States v. Wiley*, 519 F.2d 1348 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1038 (1976) (A. 7-9).

Petitioner appealed *pro se* to the United States Court of Appeals for the Second Circuit, and in a judgment entered May 30, 1979, upon an opinion filed the same date (A. 10, 11), the court of appeals affirmed. The court's affirmance was rooted in "the weight of authority." The court cited prior cases in which a special parole term imposed under §846 had been approved implicitly,[5] and quoted, approvingly and at length, from three then-recent decisions of other circuit courts of appeals holding special parole applicable to §846.[6] It did not offer any additional analysis of the statutory language.

Petitioner applied to this Court for a writ of certiorari by a *pro se* petition filed July 2, 1979 (A.20). Subsequent to the decision of the court of appeals below, but before petitioner filed his petition in this Court, the United States Court of Appeals for the Third Circuit ruled that special parole was not a lawful component of a sentence under §846,[7] thereby creating a conflict in authority among the circuits. On October 9, 1979, this Court granted certiorari (A.18), and on November 5, 1979, appointed the undersigned to serve as counsel to petitioner.

SUMMARY OF ARGUMENT

The federal drug conspiracy statute, 21 U.S.C. §846, provides for punishment of "imprisonment or fine or both which may not exceed the maximum punishment prescribed for the [object] offense. . . ." The object offense involved in this case was subject to punishment consisting of imprisonment and/or fine and, in the event that imprisonment was imposed, an additional

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[5]The cases cited were: *United States v. Armedo-Sarmiento*, note 4, *ante*; *United States v. Wiley*, note 4, *ante*; and *United States v. De La Fuente*, 550 F.2d 309 (5th Cir. 1977) (A.14).

[6]The cases cited were: *United States v. Burman*, note 4, *ante*; *United States v. Jacobson*, note 4, *ante*; and *United States v. Dankert*, 507 F.2d 190 (5th Cir. 1975) (A.14-16).

[7]*United States v. Mearns*, 599 F.2d 1296, 1298-1299 (3d Cir. 1979).

punishment of special parole. The court of appeals held that, notwithstanding the specification of punishment for conspiracy as "imprisonment or fine or both," a special parole term was authorized under §846. That this determination was erroneous is proved by the statutory language, the legislative history, the reasonableness of a literal construction, and the doctrine of lenity.

I.

Section 846 expressly provides for imprisonment and/or fine as the authorized punishments, and because special parole entails a separate form of punishment not listed in §846, a requirement that it be included in a sentence imposed thereunder would conflict with the express command of the statute. This conclusion, moreover, does not defeat the referencing utilized in §846. By establishing not an equalization requirement but only an upper limit based on the referenced section ("which may not exceed"), the referencing is satisfied by the adoption of the imprisonment and/or fine provisions without special parole. Nor does §846 function as a conduit to any other section under which sentencing will be conducted; notwithstanding that §846 takes cognizance of the prison and fine provisions of other sections, sentencing is conducted under §846 itself. Thus, the language and structure of §846 require that the referenced section's prison and fine provisions be addressed only to establish the maximum prison and/or fine which may be imposed for a particular violation of §846.

In defining the scope of punishment authorized under §846's "imprisonment or fine or both" provision, special parole cannot be included as part of the "imprisonment" provision. Throughout this subchapter in which the penal provisions related to drug abuse are enumerated and maximum terms of imprisonment for various criminal acts are set, special parole is authorized in fewer than half of these sections; when special parole is intended to be

part of the punishment, it is separately specified. Furthermore, §841 expressly describes special parole as a punishment additional to prison; by its own definition, it does not constitute a part of imprisonment. Therefore, the term "imprisonment" in §846 does not, by its own force, authorize special parole. The fact that a prison sentence imposed under the referenced substantive section, §841(b)(1)(B), would be supplemented by a special parole term does not establish that imprisonment for this §846 violation can be likewise supplemented. It is not the imprisonment provision in §841(b)(1)(B) which authorizes its special parole, but the separate special parole provision—the very authorization absent from §846.

II.

Rather than raising any doubt as to following the plain meaning of the language used in §846, the legislative history supplies support for our view that "imprisonment or fine or both" was intended to be read literally and to exclude special parole. An examination of the various predecessor bills of both houses demonstrates that Congress never varied in its specification of the punishment applicable to conspiracy. Moreover, the evolution of this legislation establishes that the phrase "imprisonment or fine or both" was resolutely maintained even after other sections were amended to provide for special parole. There is nothing in the legislative materials relating to the Comprehensive Drug Abuse Prevention and Control Act of 1970, under which the sections here in issue were enacted, that reveals an intent that special parole be applicable to the conspiracy section. By contrast, Congress' response to special parole in other sections speaks its mind clearly: a statutory provision intended to be affected by the enactment of the special parole provision is one which was explicitly amended to reflect this fact (*e.g.*, §845). Congress' failure to amend §846 to include special parole appears in every respect to have been purposeful. Certainly, this history

does not provide grounds for adopting a construction of §846 at odds with its language.

III.

There is also no basis for denying the statutory language its due on the ground that the result is unreasonable or in conflict with the purposes of this legislation. Conspiracy has traditionally been punished by imprisonment and/or fine, and our construction of §846 will result in the continuity of long applicable punishments. Also, as noted previously, many of the crimes in this subchapter punished by imprisonment do not carry additional special parole terms. The preclusion of special parole, therefore, will not render the treatment of conspiracy unique or unreasonable vis-a-vis other drug crimes. The fact that literal effectuation of the language will result in different punishments for conspiracy and, in certain circumstances, the substantive acts underlying that conspiracy, does not establish an unacceptable scheme. Indeed, a penalty structure for various conspiracies totally independent of that for assorted substantive acts is found in numerous provisions throughout the United States Code and has long been regarded as rational. The provision of §846 that conspiracy is to be punished by "imprisonment or fine or both" is thus a reasonable legislative determination, and enforcement of this provision cannot be denied.

IV.

Should the Court view the statutory language and the legislative history as less than definitive, they nevertheless provide some support for our position. Thus, there must be some doubt in petitioner's favor with respect to the applicability of special parole to conspiracy; and the Government, at the most, can show that the statute is ambiguous. Under the doctrine of

lenity, which is applicable to sentencing statutes, the Government's interpretation cannot be adopted. The narrower interpretation—that precluding the inclusion of special parole—is the proper reading.

ARGUMENT

SPECIAL PAROLE IS NOT AN AUTHORIZED COMPONENT OF A SENTENCE IMPOSED UNDER THE FEDERAL DRUG CONSPIRACY STATUTE, 21 U.S.C. §846.

Petitioner, having been convicted of participation in a drug conspiracy, was subject to the punishment specified in 21 U.S.C. §846: "imprisonment or fine or both which may not exceed the maximum punishment prescribed for the [object] offense. . . ." The terms of this section establish that the forms of punishment for conspiracy are imprisonment and fine. However, the substantive offense which was the object of the conspiracy at bar, defined in 21 U.S.C. §§841(a)(1) and 841(b)(1)(B), was subject to imprisonment not more than five years and/or fine not more than $15,000, and in the event that imprisonment was imposed, an additional punishment of special parole of at least two years.

The requirement that special parole be included for several of the substantive crimes which may underlie a §846 conspiracy has given rise to the question of whether special parole applies to a violation of the conspiracy section. This section refers to the punishment provisions of the substantive section defining the object offense to set its maximum limits, but delineates the punishment for conspiracy as "imprisonment or fine or both" exclusively. Though a majority of the courts of appeals which have addressed this question have concluded that special parole is an authorized component of a conspiracy sentence,[8] it will be

[8]Five circuit courts of appeals have held special parole to be applicable to §846: the Second Circuit (the instant case, A.11, 13-17); the *(continued)*

demonstrated herein that the minority view, which restricts the punishment for conspiracy to imprisonment and/or fine, is correct.

I.

The Language And Structure Of §846 Itself Compel A Reading Which Limits Punishment Thereunder To Imprisonment And/Or Fine, And Prohibits Inclusion Of A Special Parole Term.

The starting point in this case is the statutory language itself.[9] While those courts of appeals which have upheld the inclusion of

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Fourth Circuit (*United States v. Burman*, 584 F.2d 1354, 1357-1358 (4th Cir. 1978), *cert. denied*, 99 S.Ct. 1026 (1979)); the Fifth Circuit (*Cantu v. United States*, 598 F.2d 471, 472 (5th Cir. 1979); *cf. United States v. Dankert*, 507 F.2d 190, 191 (5th Cir. 1975)); the Eighth Circuit (*United States v. Sellers*, 603 F.2d 53, 58-59 (8th Cir. 1979)); and the Tenth Circuit (*United States v. Jacobson*, 578 F.2d 863, 867-868 (10th Cir.), *cert. denied*, 439 U.S. 932 (1978)). One court of appeals has held special parole to be inapplicable to §846: the Third Circuit (*United States v. Mearns*, 599 F.2d 1296, 1297-1299 (3d Cir. 1979); see also *United States v. Jacquinto*, 464 F.Supp. 728 (E.D. Pa. 1979) (Lord, *J.*)). Whereas we are not aware of any other circuit's ruling on the issue, a district court decision holding special parole inapplicable to §846 has been regarded as the leading case on point in the Ninth Circuit (*Fassette v. United States*, 444 F.Supp. 1245, 1246-1248 (C.D. Cal. 1978) (Hill, *J.*)). Though the weight of authority is against our position, it should be noted that the same numerical split existed prior to this Court's decision in *United States v. Bass*, 404 U.S. 336, 338 n.3 (1971).

[9]In *Blue Chip Stamp v. Manor Drug Stores*, 421 U.S. 723, 756 (1975), Mr. Justice Powell, concurring, noted: "The starting point in every case involving construction of a statute is the language itself." See also *Touche Ross & Co. v. Redington*, ____ U.S. ____, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82, 91 (1979); *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472 (1977). Strict adherence to the statutory language

special parole in a conspiracy sentence have purported to examine the language and structure of §846, they have in fact advanced a reading which distorts the terms and functioning of this statute, and ignored the governing rules of construction. A correct reading of the statutory language demonstrates that special parole cannot constitute a lawful component of a conspiracy sentence because §846 establishes only a limited reference to an associated substantive section—one which does not result in incorporation, equalization, or merger—and because the overall statutory scheme reveals that special parole is applicable to a particular criminal act only if it is expressly authorized in the applicable sentencing section.

A.

Section 846 states that attempt or conspiracy is "punishable by imprisonment or fine or both" (hereinafter referred to as the "first clause") which is "not to exceed the maximum punishment prescribed for the [object] offense" (hereinafter referred to as the "second clause"). Three points demonstrate that, notwithstand-

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does not alone guarantee a reading consistent with the legislative intent. See, *e.g.*, *United States v. Campos-Serrano*, 404 U.S. 293, 298-299 (1971); see also *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976). However, the plain language itself is entitled to some presumptive validity as the reflection of Congressional intent. See, *e.g.*, *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330-331 (1978); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 200-201 (1976); *Burns v. Alcala*, 420 U.S. 575, 580 (1975); *Bouie v. City of Columbia*, 378 U.S. 347, 355-356 (1964); *Richards v. United States*, 369 U.S. 1, 9 (1962). And in the context of a criminal statute, "the precise language of the provision must not be deprived of all force. The principle of strict construction of criminal statutes demands that some determinate limits be established based upon the actual words of the statute." *United States v. Campos-Serrano, supra*, 404 U.S. at 299; see also *United States v. Wiltberger*, 5 Wheat. (18 U.S.) 76, 95-96 (1820) (Mr. Chief Justice Marshall).

ing its reference to a substantive section which might itself include special parole, the language and structure of §846 do not define a sentencing process whereby special parole is adopted from the referenced substantive section. First, §846 lists only two forms of punishment—imprisonment and fine—and does not, explicitly or implicitly, provide for special parole. Second, the second clause does not establish an equalization of punishment between conspiracy and the object offense, but merely sets an upper limit for punishment imposed under §846. Third, §846 does not transfer the sentencing function to any other section, but is itself a sentencing section which defines its own operation.

1. To avoid the plain statutory limitation of punishment to imprisonment and/or fine, the word "punishment" in the second clause has been incorrectly construed to be a reference broader in scope than "imprisonment or fine or both" in the first clause—one which encompasses the additional punishment of special parole. See A.13-14; see also *United States v. Sellers*, 603 F.2d 53, 59 (8th Cir. 1979); *United States v. Jacobson*, 578 F.2d 863, 868 (10th Cir.), *cert. denied*, 439 U.S. 932 (1978). This interpretation takes an inappropriate liberty with the statutory language. While the word "punishment," a generic term, could in the abstract encompass any variety of sentencing options, it appears in §846 following the specific terms "imprisonment" and "fine." Under the rule of *ejusdem generis*,[10] "punishment" would signify "imprisonment or fine or both." This conclusion is further supported by the fact that "imprisonment or fine or both" in the first clause is introduced by the term "punishable," which provides a direct link to the word "punishment" in the second clause.[11] And were the term "punishment"—independently of its antecedent clause—deemed to define the range of sentencing options applicable under §846, the very substance of that first clause,

[10] *E.g., United States v. Powell*, 423 U.S. 87, 90-91 (1975); *Gooch v. United States*, 297 U.S. 124, 128 (1936).

[11] This interpretation is supported by the rule that a word is known by the company it keeps—*noscitur a sociis*. *E.g., Jarecki v. Searle & Co.*, 367 U.S. 303, 307 (1961).

"imprisonment or fine or both," would be pointless. This would offend the rule that no portion of a statute should be read to be surplusage.[12]

2. Section 846 does not require that its punishment be equated to that of an associated substantive section; it speaks of punishment not to exceed that provided in the referenced substantive section. Thus, while Congress was free to establish an equivalency by stating that conspiracy or attempt was subject to punishment equal to that of the object offense,[13] it instead adopted language which contemplates the possibility of a sentence less severe than that of the substantive section. Because a §846 sentence without special parole would "not exceed" the sentence of the referenced substantive section, the structure of §846 cannot be held to mandate the inclusion of special parole under §846. Precisely this point was ignored by the Second Circuit, A.14-15, and other courts of appeals which upheld special parole terms imposed under §846 on the view that its reference to an associated substantive section required replication of punishments. See, *e.g., United States v. Sellers, supra*, 603 F.2d at 59; *Cantu v. United States*, 598 F.2d 471, 472 (5th Cir. 1979); *United States v. Burman, supra*, 584 F.2d at 1358; *cf. United States v. Dankert*, 507 F.2d 190, 191 (5th Cir. 1975). Proof that a mandatory term of special parole is adopted by reference cannot derive from words of reference which are satisfied when special parole is precluded under §846, and these cases are incorrect insofar as they find authority to impose special parole in the language of §846.

3. Section 846 utilizes reference to an associated section not to structure a conduit to another sentencing provision but to establish the range of sentences which are permissible under §846

[12] See, *e.g., United States v. Menasche*, 348 U.S. 528, 538-539 (1955); *McDonald v. Thompson*, 305 U.S. 263, 266 (1938); *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932); *Wilderness Society v. Morton*, 479 F.2d 842, 856-857 (D.C. Cir. *en banc*), *cert. denied*, 411 U.S. 917 (1973).

[13] See *United States v. Mearns*, 599 F.2d 1296, 1298 (3d Cir. 1979); *Fassette v. United States*, 444 F. Supp. 1245, 1247 (C.D. Cal. 1978).

itself. Had Congress intended merely to criminalize attempt and conspiracy and to provide for sentencing under the statutory provision applicable to the object offense rather than under a distinct sentencing procedure, it would have been unnecessary to enact a separate sentencing section. Attempt and conspiracy could have been designated crimes under the substantive sections and punished thereunder, as had been done under the former law.[14] Congress, however, created a separate punishment provision and endowed it with its own sentencing authority, indicating that virtual independence was intended for conspiracy sentencing. The existence of §846, and its express concern with sentencing for attempt and conspiracy, establish that conspiracy is punished under §846 and not under the referenced section. Thus, the reasoning of the court of appeals, A.14-15, and the cases cited at 13, *ante*, that special parole applies to §846 because of the latter's use of reference not only misperceives the limited scope of this reference, but attributes a passiveness to §846 which is not reflective of this section's true function and functioning in sentencing.

B.

Contrary to the suggestion of several courts of appeals (see A.15-16; *United States v. Sellers, supra*, 603 F.2d at 58-59; *United States v. Burman, supra*, 584 F.2d at 1358; and *United States v. Jacobson, supra*, 578 F.2d at 868; but see *United States v. Mearns*, 599 F.2d 1296, 1298 (3d Cir. 1979)), a special parole term may not be imposed under §846 on the theory that it constitutes an integral part of the "imprisonment" authorized therein. While special parole is imposed only in conjunction with a prison sentence, and when applicable, is a mandatory component of

[14]See 21 U.S.C. (1964 ed.) former §§174; 176a, 176b; see also 26 U.S.C. (1964 ed.) former §§7237(a), 7237(b).

sentencing,[15] it does not follow that special parole is part of a sentence of imprisonment and that it requires no independent authorization in a sentencing statute.

Initially, it bears noting that Congress did not assign special parole to every substantive drug law violation which was punished by imprisonment.[16] The following chart sets forth those drug law violations which carry a possible sentence of imprisonment along with a description of the authorized sentences.

[15]Special parole, when authorized, is a compulsory supplement to imprisonment (*e.g.*, §841(b)(1)(B): "Any sentence imposing a term of imprisonment under this paragraph *shall* . . . impose a special parole term of at least two years in addition to such term of imprisonment . . ." (emphasis supplied)). Nothing in the statutory language or history allows the conclusion that special parole is applicable as an optional sentencing choice; and the fact that special parole terms are set according to a schedule of mandatory minimums indicates that, when special parole is authorized, a sentencing court may not avoid imposing a substantial sentence. Thus, the issue at bar is not whether special parole may be included in petitioner's sentence, but whether it must be.

[16]Special parole—the additional parole term appended to a criminal prison sentence and operative after any regular parole obligation incident to the imprisonment has been fulfilled—was created in the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, under which these penal sections were enacted (see Part II-A, *post*). Special parole has never been included in any other act of Congress, and it is not applicable to any other criminal sentencing provision established by Congress in any other penal section. Moreover, our research has indicated that no such provision is found in any state penal legislation. The extreme consequences of special parole and several other questions raised by special parole (but not squarely presented by the facts of this case) are summarized in note 26, *post*.

Section[17]	Crime[18]	Penalty[19]
(1) 841(b)(1)(A)	manufacture, distribute or dispense, or possess with such intent, a schedule I or II controlled substance which is a narcotic drug	imprisonment not more than 15 years and/or fine not more than $25,000; with imprisonment, special parole at least 3 years
(2) 841(b)(1)(B)	same as *(1)* except applicable to schedule I or II controlled substances not a narcotic drug, or any schedule III controlled substance	imprisonment not more than 5 years and/or fine not more than $15,000; with imprisonment, special parole at least 2 years

[17]All sections included are within Title 21 of the United States Code, Chapter 13 (Drug Abuse Prevention and Control), Subchapter I (Control and Enforcement), Part D (Offenses and Penalties). Not included in the chart, but to be noted, are those penal provisions pertaining to import and export of controlled substances, which appear within Title 21 of the United States Code, Chapter 13, Subchapter II (Import and Export). The origins of the separation of distribution and import/export offenses are alluded to in note 28 and Part II-A, *post*. The arguments offered as to the interpretation of §846 are fully applicable to §963, the conspiracy section under subchapter II.

[18]A number of the crimes are defined by reference to the schedules of controlled substances. These schedules are found in 21 U.S.C. §812.

[19]The penalties specified are for first offenses. The crimes defined in this subchapter contain second offender sentencing provisions within each individual section. The additional penalty for multiple offenders is not reflected in the penalty column. Generally, the second offender penalty provisions for each section provide for the doubling of the specified imprisonment, fine, and special parole terms.

Section	Crime	Penalty
(3) 841(b)(5)[20]	same as *(1)* except applicable to phencyclidine specifically (phencyclidine removed from *(2)* above, which applied prior to adoption of this provision in 1978)	imprisonment not more than 10 years and/or fine not more than $25,000; with imprisonment, special parole at least 2 years
(4) 841(b)(2)	same as *(1)* except applicable to schedule IV controlled substances	imprisonment not more than 3 years and/or fine not more than $10,000; with imprisonment, special parole at least 1 year
(5) 841(b)(3)	same as *(1)* except applicable to schedule V controlled substances	imprisonment not more than 1 year and/or fine not more than $5,000
(6) 841(d)[21]	possession of piperidine with intent to manufacture phencyclidine (see *(3)*)	imprisonment not more than 5 years and/or fine not more than $15,000

[20]Section 841(b)(5) was added by amendment to this subchapter in P.L.95-633, Title II, §201 (November 10, 1978, 92 Stat. 3774). It provides for the increase of penalties for crimes involving the distribution of phencyclidine, defined in 21 U.S.C. §830(c)(2), the substance involved in the conspiracy for which petitioner was convicted. At the time of petitioner's prosecution, phencyclidine was still covered by §841(b)(1)(B).

[21]Section 841(d) was added by amendment to this subchapter in P.L.95-633, Title II, §201 (November 10, 1978, 92 Stat. 3774). Under §203(d) of P.L.95-633, this section (21 U.S.C. §841(d)) is repealed effective January 1, 1981.

Section	Crime	Penalty
(7) 842(c)(2)	various infractions by manufacturers, distributors, and dispensers of controlled substances (registered under Part C of Chapter 13, subchapter I), but only when committed knowingly	imprisonment not more than 1 year and/or fine not more than $25,000
(8) 843(c)	same as *(7)* except applicable to more serious infractions (as designated); possession through fraud, counterfeit substances, use of communication facility with respect to violation of drug laws	imprisonment not more than 4 years and/or fine not more than $30,000
(9) 844(a)	simple possession of controlled substance; also (by dint of §841(b)(4)) distribution of small amount of marihuana without remuneration	imprisonment not more than 1 year and/or fine not more than $5,000
(10) 845(a)	distribution of controlled substance to person under age twenty-one by person at least eighteen	imprisonment and/or fine not more than twice that authorized under appropriate subsection (by substance) of §841(b) (see *(1)-(5)*); special parole at least twice that authorized under appropriate subsection (by substance) of §841(b) (see *(1)-(5)*)

Section	Crime	Penalty
(11) 846	attempt; conspiracy; applicable to any drug offense	imprisonment and/or fine not more than maximum punishment prescribed for object offense
(12) 848(a)[22]	continuing criminal enterprise	imprisonment not less than 10 years with maximum up to life, and fine not more than $100,000; and designated forfeitures

[22]Section 848(a) establishes the crime of continuing criminal enterprise, which is defined in §848(b) as follows:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Also pertinent to this discussion is §849, which does not establish a punishable unlawful act but provides a special sentencing procedure applicable to a "dangerous special drug offender."[23] In the event that a defendant convicted of a drug felony is found by the sentencing judge, after a hearing, to be a dangerous special drug offender, he will be subject to imprisonment for a term not to exceed twenty-five years (§849(b)).

Thus, while special parole is specifically required when prison is imposed for chart entries *(1)*, *(2)*, *(3)*, *(4)*, and *(10)*, it is not authorized with respect to prison sentences imposed under chart entries *(5)*, *(6)*, *(7)*, *(8)*, *(9)*, *(11)*, and *(12)*, nor is it a proper component under the dangerous special drug offender provision. These data indicate that Congress intended no automatic inclusion of special parole from the single fact of imprisonment; special parole was to be included only when specified.[24] The fact that §846 refers to other sections, and in this case to §841(b)(1)-(B), for the maximum amount of prison and/or fine applicable does not alter this proposition, as is demonstrated by §845 (distribution to persons under age twenty-one).[25] There, as in

[23]A conclusion that a person is a "dangerous special drug offender," as defined in §849, requires two findings. The first is that the convicted person is a "special drug offender," that is, a person who has two or more prior drug offense convictions, or is involved in a pattern of dealing in controlled substances resulting in a substantial source of income, or plays a supervisory role in a drug conspiracy with three or more other participants. Section 849(e)(1), (2), and (3). Second, a defendant must be found to be "dangerous," which entails a determination by the court that a period of confinement longer than that provided for the crime committed is required for protection of the public. Section 849(f).

[24]This Court has often remarked that legislative intent is best revealed not in an isolated section, but in an entire statute. See, *e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); *Richards v. United States*, 369 U.S. 1, 11 (1962).

[25]Section 845(a) provides:

> Any person at least eighteen years of age who violates section 841(a)(1) of this title by distributing a controlled substance to a

(continued)

§846, reference to another section is utilized to establish the amount of imprisonment and/or fine, which varies in proportion to the seriousness of the conduct as reflected in the referenced section. However, in §845, unlike §846, the inclusion of special parole is separately and specifically mandated. The absence of a corresponding special parole provision in §846, which immediately succeeds §845, is substantial evidence that Congress intended that §846 was to provide for a sentence of imprisonment which would not be supplemented by a special parole term.

Indeed, the very concept that special parole may be viewed as a part of imprisonment seriously conflicts with the distinctly independent status accorded special parole in §841. Section 841(c) provides: "A special parole term . . . shall be in addition to, and not in lieu of, any other parole provided for by law." Moreover, those sections of §841 which prescribe a special parole term to accompany imprisonment address it as being "in addition to such term of imprisonment." That special parole, when authorized, carries a mandatory minimum and no maximum, and that special parole, when revoked (§841(c)), results in a prison term equal in length to the special parole term imposed, illustrates that special parole in practice can constitute a considerable addition to a prison sentence.[26] The fact that Con-

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> person under twenty-one years of age is (except as provided in subsection (b) of this section) punishable by (1) a term of imprisonment, or a fine, or both, up to twice that authorized by section 841(b) of this title, and (2) at least twice any special parole term authorized by section 841(b) of this title, for a first offense involving the same controlled substance and schedule.

[26]Indeed, special parole can be a uniquely harsh sentencing provision. Although the terms of imprisonment are set forth under all sections of this subchapter except §848 (continuing criminal enterprise) as having maximum limits with no minimums, the statute requires special parole to be imposed in accord with mandatory minimum but no maximum limits. Because the revocation provision (§841(c)) states that "[t]he original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of

(continued)

gress intended special parole to be additional to imprisonment, and not merely an implicit part of a prison term, as is standard parole,[27] is proof that a reference to "imprisonment" alone does not mean imprisonment plus special parole.

Once it becomes manifest that imprisonment does not *ipso facto* give rise to special parole, the view expressed on the meaning of imprisonment in those court of appeals decisions cited at 14, *ante*, must fail. It may be true, as noted in *United States v. Jacobson, supra*, 578 F.2d at 868, that "a [special] parole

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imprisonment shall not be diminished by the time which was spent on parole," the special parole term may become a period of imprisonment for more than that imposed in the original prison sentence.

This anomaly is by no means the only one raised by the special parole provision. Another is that special parole is added to regular parole, regardless of a person's performance on parole or his need for further supervision. In this respect, special parole should be contrasted with various proposed parole amendments in legislation now pending before Congress. These recommendations focus on elimination of the existent scheme dividing a prison sentence into a period of incarceration and a period of parole. In the traditional division, the length of the parole term is based not on an assessment of need for supervision, but on the fixed amount of the prison sentence remaining when parole is granted. The proposals include a parole term which is somewhat independent of the originally imposed prison sentence. See, *e.g.*, S.1722 (96th Cong., 1st Sess., September 7, 1979), §2303 (Inclusion of a Sentence of Supervised Release After Imprisonment), §3824 (Release of a Prisoner); S.Rep. No. 95-605 (Part I) of the Judiciary Committee, November 15, 1977, to accompany S.1437 (95th Cong., 1st Sess.), at 931-933 (discussing S.1437, §2303); Final Report of the National Commission on Reform of Federal Criminal Laws (1971), §3201 (Sentence of Imprisonment: Incidents), and Chapter 34 (Parole: §§3401-3406); Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. II (1970) at 1312-1317) (*re*: §3201), 1329-1335 (*re*: Chapter 34—Parole). Whereas the proposed parole system is intended to assure a more rational relationship between imprisonment and parole, special parole exacerbates deficiencies in the current system.

[27]Parole is governed by the provisions of Title 18 of the United States Code, Chapter 311, §§4201 *et seq.*

term may never be imposed without imprisonment," but the converse is not true—imprisonment need not be accompanied by special parole. Throughout this chapter, the inclusion of special parole is tied not to imprisonment but to specific statutory authorization. Consistent with this design, "imprisonment" in §846 should not be read as alone effecting the inclusion of the additional special parole term.

II.

That Congress' Retention Of "Imprisonment Or Fine Or Both" In §846 Was Purposeful And Intended To So Limit The Punishment For Conspiracy Is Amply Supported By The Legislative History.

Section 846 was enacted under the Comprehensive Drug Abuse Prevention and Control Act of 1970 (hereinafter "Comprehensive Act").[28] The various legislative materials reflecting this section's development disclose a consistent and long-standing adherence to specification of the punishment applicable to §846 as "imprisonment or fine or both." This history demonstrates, moreover, that Congress' failure to amend §846 to include special parole was purposeful and not an accidental oversight. These materials, at the very least, indicate

[28]The Comprehensive Act, P.L.91-513 (84 Stat. 1236), enacted October 27, 1970, see 116 Cong. Rec. 37349 (91st Cong., 2d Sess., 1970), is codified under Title 21 of the United States Code, in Subchapters I and II of Chapter 13. Subchapter I, encompassing Titles I (rehabilitation) and II (law enforcement) of the Comprehensive Act, contains the penal provisions pertaining to distribution of controlled substances here in issue (Part D, encompassing §§841-851). Subchapter II, encompassing Title III (import/export) of the Comprehensive Act, includes penal provisions pertaining to import and export of narcotics. See Part II-A, *post*, for historical information on the legislative origins of these subchapters.

that the statutory language is not in conflict with any stated intention of Congress, and thus do not provide the Government with the evidence necessary to impose a reading at odds with the wording of §846.[29]

A.

Action in the Ninety-first Congress to develop a comprehensive statute pertaining to drug abuse began in the Senate in 1969. The two most significant preliminary Senate bills, from which S.3246, the bill passed in the Senate, was descended, were S.1895[30] and S.2637.[31] These bills were referred to the Judiciary Committee and were the subject of hearings before the Subcomittee to Investigate Juvenile Delinquency conducted on September 15, 17, 18, 24, 25, 26, and 29, and October 20, 1969.[32] Both bills defined conspiracy (with attempt) in a separate section employing the same basic wording on sentencing—imprisonment and/or fine—as does §846 (though S.1895 provided for the halving of the applicable imprisonment and/or fine for attempt, whereas S.2637 upgraded attempt to be equal to conspiracy) (S. 1895, §704, see Hearings at 74-75; S.2637, §504, see Hearings at 166). However, the conspiracy sections of these bills were the subject of no testimony or comment at these hearings.

[29]Of course, the value of the legislative history to reveal the intent of Congress is inversely proportional to the clarity of the statutory language employed. Compare *TVA v. Hill*, 437 U.S. 153, 184-185 (1978), and *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977), with *Cass v. United States*, 417 U.S. 72, 77-79 (1974), *Tidewater Oil Co. v. United States*, 409 U.S. 151, 157 (1972), and *United States v. Donruss Co.*, 393 U.S. 297, 302-303 (1969).

[30]S. 1895 was titled the Omnibus Narcotic and Dangerous Drug Control and Addict Rehabilitation Act of 1969.

[31]S. 2637 was titled the Controlled Dangerous Substances Act of 1969.

[32]Also a subject of these hearings was S. 2590, which established a marihuana commission.

Special parole, which was not included in these bills, received its first mention at the hearings. In the discussion of the sentencing provision alternatives proposed by the Office of the Attorney General (see Hearings at 215, 255), John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs of the United States Department of Justice, offered some general observations about a special parole term designed to provide a period of post-sentence supervision.[33] However, Mr. Ingersoll's comments did not address the issue of special parole's applicability to the conspiracy section; the alternative schemes did not themselves indicate that the special parole recommendation applied to the conspiracy section; and there was no further discussion by the Subcommittee on the operation of this special parole recommendation (see Hearings at 663-683).

On January 28, 1970, a new bill, S.3246,[34] passed in the Senate. This bill incorporated various changes, including, in S.3246, §501 (prohibited acts/penalties pertaining to substantive distribution and import/export violations), a provision for a special parole term to accompany the prison sentences provided therein. The section on attempt (here "endeavor") and conspiracy, S.3246,

[33]Mr. Ingersoll stated:

> Another requirement that has been included in the alternative penalty schemes is a special parole term which is a part of the illicit trafficking sentence structure. Just as incarceration is not always a meaningful answer to effective rehabilitation, certainly incarceration without an adequate supervisory follow-up after release is not in the best interest of society.
>
> Therefore, we have required a special parole term so that persons sentenced for trafficking violations would be placed under supervision for a period of time regardless of whether they are incarcerated or their sentences probated or suspended. The intent here is to give the judges another tool for sentencing and another means of protecting society when dealing with the drug violator.
>
> (Hearings at 676.)

[34]S. 3246 was titled the Controlled Dangerous Substances Act of 1969.

§504, is set forth in terms equivalent to §846.[35] Similarly, both in the "Scope of Coverage" and "Section-by-Section Analysis" sections of the Senate Report[36] which accompanied the bill, S.3246, §504 is described with explicit reference to "imprisonment or fine or both" exclusively, with no commentary suggesting the applicability of the new special parole provision.[37]

In the floor debates regarding the various bills here discussed, statements respecting special parole and conspiracy were all but non-existent, but several comments related to these topics appeared in connection with S.3246. Senator Hruska, speaking of the function of the drug schedules in determining penalties for traffickers, described special parole as "a relatively new concept, but one which will provide necessary post-incarceration supervision."[38] Because the Senator's remarks were not made with reference to any specific penal section, his statement does not shed light on the intended applicability of special parole. However, some indication may be found in a chart comparing the punishments provided under the then-current federal law and S.3246, offered by Senator Dodd[39] on the very day the Senate approved S.3246. In setting forth the punishments for conspiracy under each scheme, the chart shows that the punishment for conspiracy would not be changed under S.3246 but would

[35]S. 3246, §504 provides:

> Any person who endeavors or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the endeavor or conspiracy.

[36]S.Rep. No. 91-613 of the Judiciary Committee, December 16, 1969, to accompany S.3246; see 115 Cong. Rec. 39253 (91st Cong., 1st Sess., 1969).

[37]S. Rep.No. 91-613, note 36, *ante*, at 9, 26.

[38]See 116 Cong. Rec. 1665 (91st Cong., 2d Sess., 1970).

[39]See 116 Cong. Rec. 1653-1654 (91st Cong., 2d Sess., 1970). A copy of the chart offered by Senator Dodd on the floor of the Senate is annexed as Addendum II to petitioner's brief.

remain imprisonment and/or fine not to exceed the maximum punishment prescribed for the associated offense. Thus, the information before the Senate reflected that the new bill effected no change in punishment authorized for conspiracy as compared to the then-current provisions.

In the House of Representatives, the predecessor of H.R. 18583, the bill ultimately passed (with amendments) in both houses as the Comprehensive Act, were H.R. 13742/13743[40] and H.R. 17463.[41] The two former bills did not contain a special parole provision; the latter (H.R. 17463) did provide for special parole in conjunction with imprisonment imposed under H.R. 17463, §501, the section corresponding to 21 U.S.C. §841.

Hearings on H.R. 13743[42] were conducted before the Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce on February 3, 4, 17, 18, 19, 20, 25, 26, and 27, and March 2 and 3, 1970. On the subject of attempt and conspiracy, H.R. 13743, §504 punished each by imprisonment and/or fine not to exceed the punishment prescribed for the object offense. In testifying before this Subcommittee, Mr. Ingersoll described the punishment applicable to conspiracy in the Senate bills (S.1895 and S.2637), the three Justice Department sentencing alternatives, and the then-current federal law in identical terms: "imprisonment and/or fine" (Hearings at 92).

[40]H.R. 13742 was titled the Controlled Narcotic Drug Act of 1969. H.R. 13743 was titled the Controlled Depressant and Stimulant Drug Act of 1969. The former bill was referred to the Committee on Ways and Means because that Committee had jurisdiction over various laws used to control narcotic drugs. The latter was referred to the Committee on Interstate and Foreign Commerce because that Committee had jurisdiction over the Federal Food, Drug, and Cosmetics Act, under which the depressant and stimulant drugs covered in H.R. 13743 were regulated.

[41]H.R. 17463, which was given no short title, unified H.R. 13742 and H.R. 13743 into a single bill, and also incorporated numerous new features which, as relevant, are considered above.

[42]Also a subject of these hearings was H.R. 11701, an earlier version not here relevant.

The three Justice Department alternatives presented by Mr. Ingersoll all made provision for special parole as to the substantive sections corresponding to §841, but neither in his discussion of these alternatives nor in his recital of the punishment provisions of the various approaches described did Mr. Ingersoll suggest the applicability of special parole to attempt or conspiracy.

H.R. 13742, though focusing on different controlled substances than H.R. 13743, resembled the latter in all relevant respects. H.R. 17463, which, as noted, added special parole to the House's proposed legislation, did not amend the attempt and conspiracy section. Sections 504 of both H.R. 13742 and H.R. 17463 were identical (except for the change of terminology from "attempt" to "endeavor") and, as in every preceding formulation, specified the applicable punishment for conspiracy as imprisonment and/or fine. H.R. 13742 and H.R. 17463 were the subject of hearings before the Committee on Ways and Means held on July 20, 21, 22, 23, and 27, 1970, but there was no direct consideration of special parole. The only material before the Committee which bore on the applicability of special parole to conspiracy was a report and accompanying chart prepared by the Justice Department summarizing the provisions of the then-current federal law and H.R. 17463 (see Hearings at 221-225, 229-230). Whereas a column in the chart for indicating whether special parole was applicable was provided on the page on which the substantive crimes were listed, that column was deleted on the succeeding table page, on which conspiracy appeared (see Hearings at 229-230).[43]

Following these hearings, a new bill emerged from the Subcommittee on Public Health and Welfare, H.R. 18583, which was

[43]A copy of the chart offered by the Justice Department to the Committee on Ways and Means is annexed as Addendum III to petitioner's brief.

ultimately passed by both houses.[44] The special parole and conspiracy provisions were included in H.R. 18583 in the same terms as had been employed in H.R. 17463. In the "Section-by-Section Analysis" of the Interstate and Foreign Commerce Committee's accompanying report[45] analyzing the bill, the intended meaning of "punishment" in §406 of the bill (corresponding to 21 U.S.C. §846) is explained as follows:

> Section 406 provides that any person who attempts or conspires to commit any offense defined in this title may be punished by imprisonment and/or fine which may not exceed the maximum *amount* set for the offense, the commission of which was the object of the attempt or conspiracy. [Emphasis supplied.][46]

The use of the word "amount" to explain the meaning of "punishment" in §846 provides clear proof that "punishment" was intended merely as a reference back to "imprisonment or fine or both" and was not intended to establish a broader range of sentences than that stated in the antecedent clause. Had Congress meant for §846's second clause ("not to exceed . . .") to be independent of the first clause ("punished by . . ."), it would not have defined "punishment" as "amount." When "amount" is substituted for "punishment," the second clause, read independently of the first, has no meaning; only when the second clause is read as dependent upon the first clause does "amount" make any sense.[47]

[44]H.R. 18583 was passed in both houses (after amendments not relevant to this discussion) on October 14, 1970, after the conference report was agreed to (see 116 Cong.Rec. 36880, 36885 (Senate) and 36651, 36655 (House) (91st Cong., 2d Sess., 1970)), and was enacted as the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513 (see note 28, *ante*).

[45]H.R. Rep. No. 91-1444 of the Interstate and Foreign Commerce Committee, September 10, 1970, to accompany H.R. 18583, reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4566; see 116 Cong.Rec. 31273 (91st Cong., 2d Sess., 1970).

[46]H.R. Rep. No. 91-1444, note 45, *ante*, at 50, reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4617.

[47]*Cf. Malat v. Riddell*, 383 U.S. 569, 571 (1966) (words of statute should be read in ordinary, everyday sense).

Two conclusions are evident from the foregoing. First, under every bill drafted by both houses of the Ninety-first Congress on drug abuse, punishment for conspiracy was designated to be imprisonment and/or fine. Second, nowhere in the legislative history is there direct consideration of the intended scope of the new special parole provision, and specifically of its application to the conspiracy section. The first point requires no further discussion. This consistent expression of the terms of punishment, with its longstanding and well understood meaning, is sound proof that the same expression in §846 was intended to denote, as it always had, imprisonment and/or fine exclusively. The second point, however, invites a broader examination of Congress' response to the introduction of special parole. By this statutory evolution—by Congress' actions and inactions—the intended scope of this new provision can be discerned, and it is to this point that we now turn.

B.

Section 841(c), in setting forth the operation of special parole, refers to its imposition "in this section [§841] or section 845." This statement alone is some indication of Congress' intent that special parole be included only in those specified sections, and not in §846. But should there be any question as to Congress' intent—any suggestion that "this section" was intended to encompass §846 sentencing (but see Part I-A, *ante*) or that the limitation to two sections was inadvertent—the legislative history dispels this doubt. This explicit reference to the two sections represents an amendment to both S.3246 and H.R. 17463, which, in their parallel provisions, referred to special parole as being "imposed under this Act." (S.3246, §501(d), see S.Rep. No. 91-613, note 36, *ante*, at 117; H.R. 17463, §501(d), see Hearings before Committee on Ways and Means at 62.) The substitution of specific sections for the general term "Act" to describe the provisions to which special parole would apply

demonstrates that H.R. 18583 and ultimately the Comprehensive Act were intended to restrict the applicability of special parole to those sections specified in 21 U.S.C. §841(c).

The express reference to special parole in §845, which establishes double punishments for those convicted of distribution to persons under age twenty-one, has been mentioned in Part I-B, *ante*, as evidence that Congress intended, by eschewing reference to special parole in §846, to limit punishment under this section to imprisonment and/or fine. This proposition, too, is supported by the legislative history. S.3246, §506, and H.R. 17463, §506[48]—the two immediate predecessors of H.R. 18583, §405 (21 U.S.C. §845)—provided only that a violation under these sections be punished by up to twice the authorized imprisonment and/or fine; neither section, notwithstanding the inclusion of special parole in the referenced substantive sections, made any provision for the inclusion of a special parole term. (S.3246, §506, see S.Rep. No. 91-613, note 37, *ante*, at 118-119; H.R. 17463, §506, see Hearings before Committee on Ways and Means at 66.) H.R. 18583, §405 initiated the change reflected in 21 U.S.C. §845: in addition to the doubling provisions for imprisonment and/or fine, a separate provision authorized twice the authorized term of special parole applicable. This action establishes that Congress was conscious that a section which was to include special parole must so state, and that even when there was a reference to another section in which special parole is provided, the special parole provision of the referenced section would carry over to the referencing section only if the latter so provided. Furthermore, this action establishes that Congress was conscientious in amending those sections intended to be subject to the new special parole provision so that their language would reflect this intent. It strains logic to construe the absence of a special parole reference in §846 as unintentional when, as to the immediately preceding §845, an

[48]Though these sections are not identical to §845 in various respects, *e.g.*, age of buyer specified, they are identical to §845 in all respects relevant to this discussion.

amendment to provide for special parole was recognized as necessary to effect Congress' purpose. As Mr. Justice Frankfurter stated (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (concurring opinion)):

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.

These conclusions are corroborated by a similar attentiveness to detail respecting the various second-offender proposals. The punishment for a second offender under S.2637, §508 was set in terms of imprisonment and/or fine; and the same provision is found in H.R. 13742, §508, and H.R. 13743, §508. Both the House and the Senate, in the first bills in which special parole was included—S.3246, H.R. 17463—amended their second-offender provisions to provide separately for enhancement of any applicable special parole term. (S.3246, §508; H.R. 17463, §508.) The Comprehensive Act, moreover, retains these provisions in substance, although it replaces a separate and generally applicable second-offender section with second-offender provisions within each individual section's sentencing provision.[49] Again, Congress displayed its awareness of the need to conform sections affected by the introduction of special parole, and again Congress allowed the conspiracy section to stand unamended.

Indeed, when the amendments to both the second-offender section and the distribution to minors section are viewed together, there were three occasions—S.3246, H.R. 17463, H.R. 18583—when Congress established the applicability of special

[49]In the import/export subchapter, there is a separate second offender section applicable generally to all sentencing provisions. See §962. This section also expressly provides for enhancement of any applicable special parole term.

parole to a specific section by amending statutory language restricted to imprisonment and/or fine, and when Congress declined to amend in similar fashion the conspiracy section.

These developments in the applicability of special parole prove that Congress was cautious in its choice of language and that the retention, through various revisions, of "imprisonment or fine or both" with respect to conspiracy represents an affirmative action by Congress. Thus, Congress' intention in this matter is reflected in the statutory language, and there can be no justification for the construction urged by the Government, so clearly at odds with this criminal statute's plain meaning.

III.

Petitioner's Reading Of The Statute So As To Preclude Application Of The Special Parole Provision To Conspiracy Is Rational And Does Not Lead To Unreasonable Results.

A reading of the statute so as to exclude special parole from a §846 sentence results in an interpretation that is consistent with the overall structure of the Comprehensive Act and frustrates no law enforcement policy. Once this Court has concluded that §846 is written to punish conspiracy by imprisonment and/or fine exclusively, and that no proof of a contrary legislative intent is forthcoming, it is not the wisdom of Congress' action, but the absence of unreasonable results, which commands its acceptance.[50]

In Part I-B, *ante*, a chart is presented showing the various drug crimes and their respective penalties. The entries reveal that no

[50]See, *e.g.*, *In re Trans-Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966); *CIR v. Brown*, 380 U.S. 563, 571 (1965); *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940).

independent criterion determines the applicability of special parole. Seriousness of the crime does not invoke the special parole provision; the most heavily penalized (§848), the most leniently penalized (§844), and some in the middle range (*e.g.*, §843) are immune from special parole. Nor is special parole an incident to every sentence under §841(b), contrary to the assertion of the court in *United States v. Burman, supra*, 584 F.2d at 1358, quoted approvingly below, A.14-15; a prison sentence under §841(b)(3) does not carry an additional special parole term. And when Congress added §841(d) in 1978, which provides for a prison term of up to five years and a fine of up to $15,000—exactly the same limits applicable to §841(b)(1)(B), the substantive section implicated in petitioner's conspiracy—it did not include special parole as a component of sentence. Thus, the apparent characteristic common to every section which includes special parole is that special parole is expressly required, and from the standpoint of the statute's structure as a whole, it cannot be deemed irrational to hold special parole excluded from a conspiracy sentence under §846, which contains no such specification.

The non-applicability of special parole to §846 is also reasonable with respect to law enforcement concerns. Conspiracy may constitute as serious a danger as a substantive crime. See *Callahan v. United States*, 364 U.S. 587, 593-594 (1961); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). Thus, the punishment for conspiracy, notwithstanding the inchoate nature of the crime,[51] may be severe and need not be less than punishment for related substantive acts. This does not necessitate equality of punishments, however. Even narrowing the field to Congressional enactments, the clearest conclusion is that the punishments for conspiracy vary widely: under these

[51]The crime defined in §846 is particularly inchoate, in that, unlike the general federal conspiracy statute, 18 U.S.C. §371, no overt act is required in order to complete the crime. See, *e.g.*, *United States v. Bermudez*, 526 F.2d 89, 94 and n.1 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

conspiracy provisions, the punishment prescribed can be either independent of or related to assorted substantive crimes, and may be more than, less than, or equal to that prescribed for the substantive act.[52] Because Congress has exhibited no definite

[52]The variety in federal treatment of conspiracy is considerable. The general federal conspiracy statute, 18 U.S.C. §371, which carries a five-year maximum term of imprisonment, is applicable to criminal activities which, as substantive acts, are subject to punishments greater than, as well as less than, five years. For instance, the following substantive acts, subject to prosecution for conspiracy under 18 U.S.C. §371, are among those punished more severely than the associated conspiracy:

18 U.S.C. §81	arson
18 U.S.C. §112	assault on foreign official with deadly weapon
18 U.S.C. §113	aggravated assault
18 U.S.C. §963	armed vessels (see also 18 U.S.C. §§964, 965, 966, 967)
18 U.S.C. §1111	murder
18 U.S.C. §2031	rape
18 U.S.C. §2113	bank robbery/burglary
18 U.S.C. §2275	firing/tampering with vessels

The following substantive acts, subject to prosecution for conspiracy under 18 U.S.C. §371, are among those punished less severely than the associated conspiracies:

18 U.S.C. §112	assault on foreign official without deadly weapon
18 U.S.C. §542	statement to defraud Customs
18 U.S.C. §§599-607	election violations
18 U.S.C. §912	false personation of official
18 U.S.C. §1012	HUD violations
18 U.S.C. §1084	interstate transmission of gambling information
18 U.S.C. §§1301-1302	lottery offenses
18 U.S.C. §1381	inciting desertion in Armed Forces
18 U.S.C. §1464	broadcasting obscenity
18 U.S.C. §1705	mischief *re*: post boxes, mail

Some sections not subject to 18 U.S.C. §371 prohibit both the substantive act and conspiracy, and provide for the same punishment to be applicable to either type of violation. The following are examples:

15 U.S.C. §72	importation violation
16 U.S.C. §831t	conservation violation (*re*: TVA)

(continued)

intention with respect to the punishment applicable to conspiracy, the fact that a drug conspiracy might not be punished exactly like an underlying substantive act does not establish an unreasonable result.

Furthermore, as to the large scale conspiratorial activity which poses the most substantial threat to the public, punishment provisions other than §846 were included in the Comprehensive Act to insure punishment not equal to, but greater than, the punish-

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(footnote continued from preceding page)

18 U.S.C. §351	Congressional assassination
18 U.S.C. §§793, 794	National defense information
18 U.S.C. §1201	kidnapping
18 U.S.C. §1751	assassination of President
18 U.S.C. §1792	prison riot
18 U.S.C. §1951	robbery/extortion obstructing interstate commerce
18 U.S.C. §§2153, 2154 2155, 2156	war materials, national defense materials
18 U.S.C. §2388	military insubordination (wartime)
33 U.S.C. §990	navigable waters (fraud in compensation)
40 U.S.C. §193h	Capitol grounds
42 U.S.C. §1973j	residence requirements for voting
42 U.S.C. §§2273, 2274, 2275, 2276, 2277,	atomic energy
47 U.S.C. §509	telephones, telegraphs, etc.—contests

There are also sections which expressly apply to conspiracy without any provision for substantive violations. Such sections include:

15 U.S.C. §§1, 2	antitrust
18 U.S.C. §241	rights of citizens
18 U.S.C. §286	defraud Government
18 U.S.C. §372	impede/imperil officer
18 U.S.C. §956	injure property of foreign government
18 U.S.C. §2384	sedition
42 U.S.C. §1985	interference with civil rights
50 U.S.C. §783	establish totalitarian dictatorship

The lack of any consistent rule as to the punishment for conspiracy is thus manifest, and the proposition that a 21 U.S.C. §846 violation must be punished identically to the underlying substantive acts finds no support in the punishment provisions applicable to other conspiracy sections.

ment authorized in §841. First, §849 establishes special sentencing procedures for the "dangerous special drug offender;" and the definition of "special drug offender" includes as one of three alternatives a four-person conspiracy engaged in a pattern of drug violations (§849(e)(3)). Second, §848 establishes, as a separate crime, "continuing criminal enterprise;" this pertains expressly to the organizers or supervisors of conspiracies involving a minimum of six persons engaged in a continuous enterprise of serious drug violations (§848(b)). A person sentenced as a dangerous special drug offender is subject to up to twenty-five years' imprisonment (§849(b)), and a person convicted under the continuing criminal enterprise section is subject to a prison term not less than ten years and up to life, as well as a fine not more than $100,000 and specified forfeitures (§848(a)(1) and (2)).[53] Thus, there is sufficient authorization for severe punishment of the most dangerous conspiracies to preclude a finding that the lesser penalty under §846 vis-a-vis §841—that is, the absence of special parole—gives rise to unreasonable results.

Any reading of §846 grounded not in what Congress did but in what it might have done would involve this Court in judicial legislating. Thus, even an explanation for Congress' failure to amend §846 grounded in inadvertence does not provide sufficient reason to disregard what the statute commands. Mr. Justice Frankfurter, in *Some Reflections on the Reading of Statutes*, 47 Colum.L.Rev. 527, 534 (1947), quoted Mr. Justice Brandeis in *Iselin v. United States*, 270 U.S. 245, 250-251 (1926), and added his own observation:

> "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope." An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend this inclusion.

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[53]Neither of these sections provides for the inclusion of a special parole term.

Section 846 as written—without special parole—is perfectly reasonable, and the letter of the law should be enforced.

IV.

A Conclusion That There Is Ambiguity Concerning The Ambit Of The Special Parole Provision Vis-A-Vis §846 Should Be Resolved Against The Inclusion Of Special Parole Under The Doctrine Of Lenity.

The interpretation offered by the court of appeals below and by the Government is not easily reconciled with the plain language of the statute; to follow this reading may, as just noted, lead this Court to perform a statutory surgery properly left to Congress. This suggests that, should the Court not accept our analysis, the most the Government can do is establish that the statute is ambiguous. To conclude that special parole is incorporated within "imprisonment or fine or both," notwithstanding Congress' resolute retention of this phase after the enactment of the special parole provision, "would not only take liberties with the language and legislative history of [the statute], it would also contravene this Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." See *Dunn v. United States*, ——U.S——, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743, 754 (1979).

Should the Court view the statutory materials as inconclusive on the issue of whether §846 incorporates special parole, the narrower reading advanced in this brief should be accepted. This Court has long followed the "wise principle" that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971), quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971).[54] The

[54]See also *United States v. Batchelder*, —— U.S. ——, 99 S.Ct. 2198, 2202-2203, 60 L.Ed.2d 755, 763 (1979); *Dunn v. United States*, *(continued)*

Court has confirmed, moreover, that this doctrine is equally applicable to the construction of penal sentencing statutes. See *United States v. Batchelder*, —— U.S. ——, 99 S.Ct. 2198, 2202-2203, 60 L.Ed.2d 755, 763 (1979); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Ladner v. United States*, 358 U.S. 169, 178 (1958).[55] Because the Government can point to nothing in the language or the history which establishes, with requisite certainty, that Congress intended special parole to supplement the prison sentence specified in §846, the most the Government can establish is that the issue is subject to some doubt, and lenity compels our narrower reading.

In *United States v. Bass, supra*, 404 U.S. at 348, the Court described lenity as resting on two principles. The first entails the policy of "fair warning." The second is the rationale framed by Judge Friendly:[56] "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." This last point is particularly apt here in light of the potentially severe consequences of an additional special parole term.

(footnote continued from preceding page)

—— U.S. ——, 99 S.Ct. 2190, 2197, 60 L.Ed.2d 743, 754 (1979); *United States v. Naftalin*, —— U.S. ——, 99 S.Ct. 2077, 2084, 60 L.Ed.2d 624, 633 (1979); *United States v. Culbert*, 435 U.S. 371, 379 (1978); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-285 (1978); *Scarborough v. United States*, 431 U.S. 563, 577 (1977); *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *Ladner v. United States*, 358 U.S. 169, 178 (1958); *Bell v. United Sta' s*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952); H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 208-209 (1967).

[55]*Cf. United States v. Campos-Serrano*, 404 U.S. 293, 297 (1971); *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905) (a person "is not to be subjected to a penalty unless the words of the statute plainly impose it").

[56]H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 209 (1967).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to vacate petitioner's special parole term as unlawfully imposed under §846.

Respectfully submitted,

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for the Petitioner.

WILLIAM E. HELLERSTEIN,
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Of Counsel.

ADDENDUM I

CRIMINAL INDICTMENT

UNITED STATES v. JOHN McFARLAND, MICHAEL THISTLETHWAITE, ALPHONSE BIFULCO, MARIO BIFULCO, and ROSEANN POLIMENI

Eastern District of New York 76 Cr. 822

Filed December 30, 1976

THE GRAND JURY CHARGES:

From in or about and between June 1975 up to the date of the filing of this indictment, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants JOHN McFARLAND, also known as John Kane, MICHAEL THISTLETHWAITE, also known as Mike Thistle, ALPHONSE BIFULCO, MARIO BIFULCO and ROSEANN POLIMENI together with Larry DeMaio, Robert Borsillino, John Kowalchick, and Stephen Kopf, named herein as co-conspirators but not as defendants, together with others known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree to violate Section 841(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally manufacture substantial quantities of phencyclidine, a Schedule III controlled substance.

2. It was further a part of said conspiracy that the defendants and co-conspirators would knowingly and intentionally distribute and possess with intent to distribute substantial quantities of phencyclidine, a Schedule III controlled substance.

3. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the con-

spiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Section 846.)

A TRUE BILL

/s/ Victoria Klepper
VICTORIA KLEPPER

/s/ David G. Trager
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

ADDENDUM II

COMPARISON OF PENALTY STRUCTURES BETWEEN S. 3246 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW

116 Cong. Rec. 1654

(91st Cong., 2d Sess., 1970)

COMPARISON OF PENALTY STRUCTURES BETWEEN S. 3246 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW

Violation	Law applicable	Maximum fine	Sentence (years)	Special parole term	Probation or suspended sentence permitted	Parole permitted
Unlawful distribution, possession with intent to distribute, manufacture, importation and exportation, etc.	Present law:					
	Narcotics	$20,000	5 to 20	No	No	No.
	Marihuana	20,000	do	No	No	Yes.
	Dangerous drugs	10,000	Up to 5	No	Yes	Yes.
(1st offense)	S. 3246:					
Note: Under existing Federal law, possession with intent to distribute is not a separate offense.	I and II narcotics	25,000	Up to 12	At least 3 years	Yes	Yes.
	I and II nonnarcotic and III substances	15,000	Up to 5	At least 2 years	Yes	Yes
	IV substances	5,000	Up to 1	No	Yes	Yes.
(2d offense)	Present law:					
	Narcotics	20,000	10 to 40	No	No	No.
	Marihuana	20,000	do	No	No	No.
	Dangerous drugs	20,000	Up to 5	No	Yes	Yes
	S. 3246:					
	I and II narcotics	50,000	Up to 24	At least 6 years	Yes	Yes.
	I and II nonnarcotic and III substances	30,000	Up to 10	At least 4 years	Yes	Yes.
	IV substances	10,000	Up to 2	No	Yes	Yes.

Violation	Law applicable	Maximum fine	Sentence (years)	Probation or suspended sentence permitted	Parole permitted
Simple possession (First offense)	Present law:				
	Narcotics	$20,000	2 to 10	Yes	Yes.
	Marihuana	20,000	do	Yes	Yes.
	Dangerous drugs	1,000	Up to 1	Yes	Yes.
	S. 3246:				
	I and II narcotics	5,000	do	Yes	Yes.
	I and II nonnarcotic and III substances	5,000	do	Yes	Yes.
	IV substances	5,000	do	Yes	Yes.
(2d offense)	Present law:				
	Narcotics	20,000	5 to 20	No	No.
	Marihuana	20,000	do	No	Yes.
	Dangerous drugs	1,000	Up to 1	Yes	Yes.
	S. 3246:				
	I and II narcotics	10,000	Up to 2	Yes	Yes.
	I and II nonnarcotics and III substances	10,000	do	Yes	Yes.
	IV substances	10,000	do	Yes	Yes.
Distribution of small amounts of marihuana for no profit	Present law:				
	No applicable provisions.				
	S. 3246:				
(1st offense)		5,000	1	Yes	Yes.
(2d offense)		15,000	Up to 10	Yes	Yes.
Continuing criminal enterprise	Present law:				
	No applicable provisions.				
	S. 3246:				
(1st offense)		50,000	5 to life	No	No.
(2d offense)		100,000	10 to life	No	No.

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VIOLATION	
Distribution to persons under the age of 18	S. 3246 provides that any person over 18 who knowingly and intentionally violates subsec. 501(a)(1) by distributing a substance classified in schedules I or II which is a narcotic to a person under 18 years of age who is at least 3 years his junior is punishable by a term of imprisonment twice that authorized by subsec. 501(c)(1), by a fine of $25,000, or both. Distribution of any other controlled dangerous substance classified in schedules I, II, III or IV by a person over 18 to a person under 18 who is at least 3 years his junior is punishable by a term of imprisonment up to twice that authorized under subsec. 501(c)(2) or (3), by the fine authorized under subsection 501(c) (2) or (3), or both. For any of these offenses, imposition or execution of sentences cannot be suspended and probation cannot be granted. Under existing Federal law, distribution of narcotics or marihuana by a person over 18 to a person under 18 years of age is punishable by imprisonment for not less than 10 years nor more than 40 years and, in addition, may be fined not more than $20,000. Imposition or execution of such sentence cannot be suspended and probation cannot be granted. In addition, if the offense involves a narcotic drug, the parole provisions under Federal law shall not apply. Under the Drug Abuse Control Amendments of 1965, a person over 18 who distributed dangerous drugs to a person under 21 years of age is punishable by imprisonment for not more than 10 years, a fine not exceeding $15,000, or both. A second offense is punishable by imprisonment for not more than 15 years, a fine not exceeding $20,000, or both.
Conditional discharge for possession as 1st offense.	S. 3246 provides that a court may, upon finding any person guilty of possessing a controlled dangerous substance without intent to distribute, and who has not previously been convicted under any Federal or State law relating to narcotic drugs, marihuana, stimulant, depressant, or hallucinogenic drugs, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require. Upon violation of the terms of probation, the court may enter an adjudication of guilt and proceed as provided by the respective acts. Upon fulfillment of the terms of probation, the court shall discharge the person and dismiss the proceedings. Such discharge shall not be deemed a conviction for the purposes of the disabilities imposed by law upon persons convicted of crimes. However, such discharge and dismissal under these sections is available only once with respect to any person. There are no provisions for 1st-offender treatment under present Federal law for offenses involving possession of narcotics or marihuana. There is a provision allowing for 1st-offender treatment under the Drug Abuse Control Amendments of 1965, but it is applicable only to cases involving possession of dangerous drugs.
Endeavor and conspiracy	S. 3246 provides that any person who endeavors or conspires to commit any offense under the act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment proscribed for committing the offense. Present Federal law provides that any person who conspires to commit an offense under any of the acts may be punished by imprisonment and/or fine not exceeding the maximum punishment proscribed for committing the offense. Attempt to commit an offense under any of the existing acts is not punishable as an offense.

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ADDENDUM III

COMPARISON OF PENALTY STRUCTURES BETWEEN H.R. 17463 (CONTROLLED SUBSTANCES ACT OF 1969) AND PRESENT LAW

Hearings before Committee on Ways and Means

***re*: H.R. 13742 and H.R. 17463 (July 1970) at 229-230**

COMPARISON OF PENALTY STRUCTURES BETWEEN H.R. 17463 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW

Violation	Law applicable	Maximum fine	Sentence	Special parole term	Probation or suspended sentence permitted	Parole permitted
Unlawful distribution, possession with intent to distribute, manufacture, importation, and exportation, etc.:						
1st offense	Present law:					
	Narcotics	$20,000	5 to 20 years	No	No	No.
	Marihuana	20,000	do	No	No	Yes.
	Dangerous drugs	10,000	Up to 5 years	No	Yes	Yes.
	H.R. 17463:					
	I and II narcotics	25,000	Up to 12 years	(1)	Yes	Yes.
	I and II nonnarcotic and III substances.	15,000	Up to 5 years	(2)	Yes	Yes.
	IV substances	5,000	Up to 1 year	No	Yes	Yes.
2d offense	Present law:					
	Narcotics	20,000	10 to 40 years	No	No	No.
	Marihuana	20,000	do	No	No	Yes.
	Dangerous drugs	20,000	Up to 5 years	No	Yes	Yes.
	H.R. 17463:					
	I and II narcotics	50,000	Up to 24 years	(3)	Yes	Yes.
	I and II nonnarcotic and III substances.	30,000	Up to 10 years	(4)	Yes	Yes.
	IV substances	10,000	Up to 2 years	No	Yes	Yes.
Simple possession:						
1st offense	Present law:					
	Narcotics	20,000	2 to 10 years		Yes	Yes.
	Marihuana	20,000	do		Yes	Yes.
	Dangerous drugs	1,000	Up to 1 year		Yes	Yes.
	H.R. 17463:					
	I and II narcotics	5,000	do		Yes	Yes.
	I and II nonnarcotics and III substances	5,000	do		Yes	Yes.
	IV substances	5,000	do		Yes	Yes.
2d offense	Present law:					
	Narcotics	20,000	5 to 20 years		No	No.
	Marihuana	20,000	do		No	Yes.
	Dangerous drugs	1,000	Up to 1 year		Yes	Yes.
	H.R. 17463:					
	I and II narcotics	10,000	Up to 2 years		Yes	Yes.
	I and II nonnarcotics and III substances	10,000	do		Yes	Yes.
	IV substances	10,000	do		Yes	Yes.

See footnotes at end of table.

COMPARISON OF PENALTY STRUCTURES BETWEEN H.R. 17463 (CONTROLLED DANGEROUS SUBSTANCES ACT OF 1969) AND PRESENT LAW—Continued

Violations	Law applicable	Maximum fine	Sentence	Probation or suspended sentence permitted	Parole permitted
Distribution of small amounts of marihuana for no profit.	Present law: No applicable provisions.				
	H.R. 17463:				
1st offense		$5,000	1 year	Yes	Yes.
2d offense		15,000	Up to 10 years	Yes	Yes.
Continuing criminal enterprise.	Present law: No applicable provisions.				
	H.R. 17463:				
1st offense		50,000	5 years to life	No	No.
2d offense		100,000	10 years to life	No	No.
Conditional discharge for possession as 1st offense	(5)				
Endeavor and conspiracy	(6)				
Distribution of persons under the age of 18	(7)				

1 At least 3 years.
2 At least 2 years.
3 At least 6 years.
4 At least 4 years.

5 H. R. 17463 provides that a court may, upon finding any person guilty of possessing a controlled dangerous substance without intent to distribute, and who has not previously been convicted under any Federal or State law relating to narcotic drugs, marihuana, stimulant, depressant, or hallucinogenic drugs, defer further proceedings and place the person on probation upon such reasonable terms and conditions as it may require. Upon violation of the terms of probation, the court may enter an adjudication of guilt and proceed as provided by the respective acts. Upon fulfillment of the terms of probation, the court shall discharge the person and dismiss the proceedings. Such discharge shall not be deemed a conviction for the purposes of the disabilities imposed by law upon persons convicted of crimes. However, such discharge and dismissal under these sections is available only once with respect to any person.

There are no provisions for 1st offender treatment under the present Federal law for offenses involving possession of narcotics or marihuana. There is a provision allowing for 1st offender treatment under the Drug Abuse Control Amendments of 1965, but it is applicable only to cases involving possession of dangerous drugs.

6 H.R. 17463 provides that any person who endeavors or conspires to commit any offense under the act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment proscribed for committing the offense.

Present Federal law provides that any person who conspires to commit an offense under any of the acts may be punished by imprisonment and/or fine not exceeding the maximum punishment proscribed for committing the offense. Attempt to commit an offense under any of the existing acts is not punishable as an offense.

7 H.R. 17463 provides that any person over 18 who knowingly and intentionally violates subsec. 501(a)(1) by distributing a substance classified in schedules I or II which is a narcotic to a person under 18 years of age who is at least 3 years his junior is punishable by a term of imprisonment twice that authorized by subsec. 501(c)(1), by a fine of $25,000, or both. Distribution of any other controlled dangerous substance classified in schedules I, II, III, or IV by a person over 18 to a person under 18 who is at least 3 years his junior is punishable by a term of imprisonment up to twice that authorized under subsec. 501(c) (2) or (3), by the fine authorized under subsec. 501(c) (2) or (3) or both. For any of these offenses, imposition or execution of sentences cannot be suspended and probation cannot be granted.

Under existing Federal law, distribution of narcotics or marihuana by a person over 18 to a person under 18 years of age is punishable by imprisonment for not less than 10 years nor more than 40 years and, in addition, may be fined not more than $20,000. Imposition or execution of such sentence cannot be suspended and probation cannot be granted. In addition, if the offense involves a narcotic drug, the parole provisions under Federal law shall not apply. Under the Drug Abuse Control Amendments of 1965, a person over 18 who distributed dangerous drugs to a person under 21 years of age is punishable by imprisonment for not more than 10 years, a fine not exceeding $15,000, or both. A 2d offense is punishable by imprisonment for not more than 15 years, a fine not exceeding $20,000, or both.

Note: Under existing Federal law, possession with intent to distribute is not a separate offense.

FOR ARGUMENT

Supreme Court, U.S.
FILED
JAN 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-5010

In the Supreme Court of the United States

OCTOBER TERM, 1979

ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 12-19) is reported at 600 F.2d 407.

JURISDICTION

The judgment of the court of appeals (A. 11) was entered on May 30, 1979. The petition for a writ of certiorari was filed on July 2, 1979, and was granted on October 9, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a special parole term may be imposed for conspiracy to violate the Comprehensive Drug Abuse Prevention and Control Act of 1970 when such a term is authorized for the object offense.

STATUTES INVOLVED

21 U.S.C. 841 provides in pertinent part:

(a) Unlawful Acts.

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) * * *

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine or not more

than $15,000 or both. * * * Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.[1]

(c) Special Parole Term

A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

21 U.S.C. 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter is

[1] This subsection was amended by Congress in 1978 to conform it to another amendment prohibiting possession of piperidine. See Pub. L. No. 95-633, 92 Stat. 3774, Title II, Section 201, and note 5, *infra*. The amendment is not pertinent to the issue presented by this case.

punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of New York, petitioner and two co-defendants were convicted of conspiring to manufacture, distribute, and possess with intent to distribute phencyclidine, a Schedule III controlled substance, in violation of 21 U.S.C. 846.[2] Petitioner was fined $1,000 and was sentenced to four years' imprisonment, to be followed by a five year term of special parole. The court of appeals affirmed by judgment order (Pet. App. 1).

Thereafter, petitioner filed a pro se motion to vacate his sentence under 28 U.S.C. 2255. He claimed that the court should not have imposed a term of special parole because such a punishment is not expressly authorized by the drug conspiracy statute, 21 U.S.C. 846 (A. 3-7). The motion was denied (A. 8-9).

2. The Second Circuit affirmed, adopting the reasoning of *United States* v. *Burman*, 584 F.2d 1354 (4th Cir. 1978), cert. denied, 439 U.S. 1118 (1979), and *United States* v. *Jacobson*, 578 F.2d 863 (10th

[2] The statement in the court of appeals decision (A. 12) that petitioner was charged with but acquitted on two counts of substantive violations of Section 841(a)(1) is erroneous. See Pet. Br. 3 n.2 and Addendum I.

Cir.), cert. denied, 439 U.S. 932 (1978). The court held that the proper penalty for a Section 846 conspiracy offense is determined by reference to the penalty authorized for the offense that was the object of the conspiracy, in this case 21 U.S.C. 841(a)(1). Because Section 841(b) mandates a special parole term whenever a sentence of imprisonment is imposed for a violation of Section 841(a)(1), the court held, it likewise must be imposed for conspiracy to violate that section (A. 16-17).

SUMMARY OF ARGUMENT

The structure and history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 combine with common sense to dictate the conclusion that a special parole term must be imposed as part of a sentence for drug conspiracy whenever such a penalty is mandated for commission of the substantive offense that is the object of the conspiracy.

The section of the Drug Abuse Act prohibiting conspiracies, 21 U.S.C. 846, does not itself contain a penalty scheme. Instead, it incorporates by reference the sentencing provisions of the Act's substantive offense sections, some of which—the sections defining the more serious crimes—mandate that a term of special parole be appended to every term of imprisonment. It is thus apparent from the very structure of the Drug Abuse Act that special parole terms, where appropriate for object offenses, must be imposed for conspiracies as well.

The fact that Section 846 speaks specifically of fines and imprisonment and makes no mention of special parole does not detract from this view. The intent of Congress to authorize fully coterminous sentences for conspiracies and underlying substantive offenses is clear. Prior to the enactment of the Drug Abuse Act, federal drug laws authorized identical penalties for conspiracies and completed offenses. The Drug Abuse Act did not disturb this historical congruence. It was designed to consolidate existing legislation, eliminate its inconsistencies and inadequacies, and establish a more realistic sentencing structure. However, at no time during the consideration of the initial bill or any of the amendments and substitute bills that followed did anyone in Congress even suggest that sentences for conspiracy and underlying substantive offenses should differ.

Even after the concept of special parole was introduced by the Department of Justice midway through Congress's consideration of what was to become the Drug Abuse Act, all indications were that the traditional congruence would continue. Thus, a Justice Department witness, after describing the various drug trafficking offenses for which special parole was to be authorized, turned to the proposed conspiracy section and explained to the House Ways and Means Committee that sentences for conspiracy would mirror those for underlying offenses. This view, and its implications for special parole, was not challenged, then or at any time prior to passage of the Act.

It thus is apparent that Congress's failure to include the term special parole in Section 846's boiler

plate was, at worst, inadvertent. However, in view of the Drug Abuse Act's structure and legislative history, inclusion of the term was not necessary for a clear understanding of the sentences authorized by the Act. Moreover, inasmuch as in every instance where special parole is authorized it is a mandatory adjunct of imprisonment, the use of the term "imprisonment" in Section 846 can and should be read as necessarily encompassing special parole.

Finally, structure and legislative history aside, it is inconceivable in view of the objectives of the Drug Abuse Act that Congress intended to withhold special parole as a means of penalizing conspiracy while mandating it for object offenses. In passing the Act, Congress sought to make it possible for sentencing judges to tailor sentences to individual offenders, and in the case of major traffickers to impose sentences stringent enough to deter misconduct. Special parole was viewed as well-suited to these ends. It would provide a means of fostering rehabilitation through an additional period of supervised community release. At the same time it held the promise of operating as a powerful deterrent to repetition of criminal behavior, since parole revocation would result in imprisonment for a period equal to the special parole term, undiminished by time actually spent on parole. Trial judges would be left free to fix whatever special parole term, above a statutory minimum, they deemed appropriate for a given offender.

In terms of gravity of conduct, need for additional deterrence and rehabilitation, or any other criterion,

there exists no rational basis for concluding that the Congress that fashioned the remedy of special parole for persons engaged in distribution of dangerous drugs could have wished to discard that remedy in the case of persons convicted of conspiring to commit such offenses. Rather than ascribe any such irrational distinction to the Congress, this Court should construe Section 846, as it doubtless was intended, to require imposition of special parole terms whenever such terms are required for the object offense.

ARGUMENT

IMPOSITION OF A SPECIAL PAROLE TERM IS MANDATED FOR A DRUG CONSPIRACY OFFENSE WHENEVER SUCH PENALTY IS MANDATED FOR THE OBJECT OFFENSE

A. The Drug Abuse Prevention and Control Act of 1970 is Structured to Incorporate into the Conspiracy Statute the Penalty Provisions of the Substantive Offense Statutes, Including Special Parole

Petitioner contends (Pet. Br. 10-23) that because 21 U.S.C. 846 refers only to "imprisonment or fine or both" and does not expressly authorize imposition of special parole as a penalty for conspiracy to violate the federal drug law, his sentence to a term of special parole constitutes an impermissible expansion of the statute's sentencing provisions. This argument is inconsistent with the framework of the larger statute of which Section 846 is a part, the Comprehensive

Drug Abuse Prevention and Control Act of 1970 (hereinafter referred to as the "Drug Abuse Act").[3]

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[3] For this reason it has been rejected by five of the six circuits that have addressed the question. In addition to the Second Circuit, the Fourth, Fifth, Eighth, and Tenth Circuits have expressly upheld the imposition of special parole terms for drug conspiracy offenses. *United States* v. *Sellers*, 603 F.2d 53 (8th Cir. 1979), petition for cert. pending, No. 79-5485; *Cantu* v. *United States*, 598 F.2d 471, 472 (5th Cir. 1979); *United States* v. *Burman*, 584 F.2d 1354 (4th Cir. 1978), cert. denied, 439 U.S. 1118 (1979); *United States* v. *Jacobson*, 578 F.2d 863, 867-868 (10th Cir.), cert. denied, 439 U.S. 932 (1978). See also, *United States* v. *Dankert*, 507 F.2d 190, 191 (5th Cir. 1975) (sustaining imposition of a special parole term under the drug importation conspiracy statute, 21 U.S.C. 963, which contains language identical to that of Section 846.)

Moreover, in *Timmreck* v. *United States*, 577 F.2d 372, 373 (6th Cir. 1978), rev'd on other grounds, No. 78-744 (May 21, 1979), the Sixth Circuit assumed that it was necessary to add a term of special parole to a sentence of imprisonment for a drug conspiracy conviction under Section 846. In reversing that court's holding that failure to inform the defendant about the mandatory special parole term upon accepting his plea of guilty to the conspiracy offense justified collateral relief under 28 U.S.C. 2255, this Court also assumed that special parole was "required by the applicable statute." *United States* v. *Timmreck, supra*, slip op. 2 & n.2. Special parole terms have regularly been upheld in connection with drug conspiracy offenses in other cases as well. *United States* v. *Moreno*, 569 F.2d 1049 (9th Cir. 1978); *United States* v. *Scholle*, 553 F.2d 1109 (8th Cir.), cert. denied, 434 U.S. 940 (1977); *United States* v. *De La Fuente*, 550 F.2d 309 (5th Cir. 1977); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 794-795 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977); *United States* v. *Wiley*, 519 F.2d 1348 (2d Cir. 1975); *United*

It is well settled that "a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling [its] responsibility in interpreting legislation [this Court] 'must be not guided by a single sentence but should look to the provisions of the whole law * * *'." *Richards* v. *United States*, 369 U.S. 1, 11 (1962) (footnote omitted). Accord, *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Labor Board* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957). See *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 402-403 (1975); *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850); 2A J. Sutherland, *Statutes and Statutory Construction* § 46.05 (1973). In this respect, "courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions * * *." *United States* v. *Bass*, 404 U.S. 336, 344 (1971). Indeed, even in the context of sentencing provisions in penal statutes, a single phrase should not be construed in isolation from the statutory scheme as a whole when to do so would result in a meaning that contradicts or distorts "the fair import of the whole remaining language." *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948); see, *e.g.*, *United States* v. *Campos-Serrano*, 404 U.S.

States v. *Rich*, 518 F.2d 980, 986-987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976).

The Third Circuit alone has held that a special parole term may not be imposed as a penalty for drug conspiracy offenses. *United States* v. *Mearns*, 599 F.2d 1296 (3d Cir. 1979), petition for cert. pending, No. 79-415. Accord, *Fassette* v. *United States*, 444 F. Supp. 1245 (C.D. Cal. 1978).

293, 298 (1971); *United States* v. *Bass*, *supra*, 404 U.S. at 350-351.

Thus, standing alone, the isolated language upon which petitioner's argument focuses is not dispositive of whether a special parole term is a permissible penalty for a conspiracy offense. One must look to the statutory framework of the Act as a whole. We submit that although Section 846 "does not refer explicitly to [special parole], [t]he language, structure, and history of the statute * * * demonstrate that Congress meant to authorize" imposition of special parole whenever such a penalty is authorized for the target offense. *Dalia* v. *United States*, 441 U.S. 238, 249 (1979).

Sections 841 through 845 of the Drug Abuse Act (21 U.S.C. 841-845) define substantive offenses and establish a complex scheme of penalties for their commission. Specifically, Sections 841 through 844 define nine separate offenses, each with its own set of penalties based upon the type of transaction entered into and the nature and classification of the substance involved.[4] See Pet. Br. 15-17 (Table). With a single exception,[5] the authorized fine and imprison-

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[4] Section 812 of the Comprehensive Act, 21 U.S.C. 812, classifies controlled substances into five different schedules. Classification within these schedules is based upon a substance's potential for abuse, the extent to which the substance has a currently accepted medical use, and the likelihood that abuse will lead to dependency.

[5] See 21 U.S.C. 841(d) (possession of piperidine). Sections 841(b)(5) and 841(d) were added in 1978. Pub. L. No. 95-633, 92 Stat. 3774, Title II, Section 201. Section 841(b)(5) removed phencyclidine from Section 841(b)(1)(B)

ment [6] are doubled if the defendant has one or more prior convictions for violating the Act or any other federal law relating to abuse of specified controlled substances. Of the nine separate offenses, the four most serious mandate imposition of a special parole term whenever imprisonment is imposed.[7] See 21 U.S.C. 841(b)(1)(A), 841(b)(1)(B), 841(b)(2) and 841(b)(5). For second offenders, the minimum special parole term must be at least doubled. *Ibid.*

Section 845 establishes a different penalty scheme for violations of Section 841(a)(1) that involve distribution of controlled substances to persons under 21

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and increased the penalty for trafficking offenses involving that substance. Section 841(d) made possession of piperidine with intent to manufacture phencyclidine a separately punishable offense.

[6] Sections 841-845 fix the maximum fine and imprisonment that may be imposed; they do not prescribe minimums. Sections 841 and 845 fix the minimum special parole term that must be imposed; they do not prescribe maximums.

[7] Petitioner correctly notes (Pet. Br. 34) that Section 848 penalizes an offense more serious than those defined in Sections 841-845, and yet does not authorize a special parole term. That is because Section 848 adopts a wholly different, and more severe, sentencing scheme for persons who engage in a continuing criminal enterprise. For first offenders it fixes a term of imprisonment of *at least* 10 years and not exceeding life, a fine not exceeding $100,000, and forfeiture of profits from the enterprise and all property related to it. For persons previously convicted under that section, the minimum fine and term of imprisonment are doubled. Similarly, the fact that special parole is not authorized for "dangerous special drug offenders" under Section 849 has no bearing on the question presented here, since persons sentenced under that section are subject to imprisonment for up to 25 years.

years of age by persons 18 years of age and over. See pages 15-16, *infra*.

Section 846 prohibits conspiracies and attempts to commit the substantive offenses described in Sections 841 through 845. Unlike those sections, however, it has no specific sentencing provision. Instead, Section 846 incorporates by reference the sentencing provisions of the substantive offenses, and provides that conspiracies and attempts are punishable "by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the [substantive] offense, the commission of which was the object of the attempt or conspiracy." [8]

The question presented in this case is whether Congress's failure to include the words "special parole" in the quoted phrase manifests an intent to effect something less than a complete incorporation of

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[8] Subchapter II of the Comprehensive Act, governing the import and export of controlled substances, contains a similar sentencing structure. 21 U.S.C. 960 and 961 define substantive offenses and establish a penalty structure for violations. Section 960(b) imposes a mandatory special parole term whenever a sentence includes imprisonment. Section 962 provides for the enhancement of sentences for repeat offenders. Section 963, in language identical to that in Section 846, prohibits attempts and conspiracies to commit any offense defined in the subchapter and authorizes punishment "by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Therefore, our submission that special parole must be imposed for a Section 846 conspiracy whenever it is a component of the punishment for the object offense is equally applicable to conspiracies under Section 963.

the sentencing provisions set out in the substantive offense sections. We submit that it does not. The very structure of the Act compels the conclusion that Congress intended to incorporate into the attempt and conspiracy section precisely the same combinations of penalties—fine, imprisonment, and, for the four most serious offenses, special parole—as set out in the substantive sections.

In structuring the Act so as to include attempts and conspiracies, Congress could have pursued any one of four basic approaches. Congress could have drafted: 1) substantive offense sections that fixed the punishment both for committing a forbidden act and for attempting or conspiring to do so; 2) a separate attempt and conspiracy section that included its own sentencing provisions; 3) a separate attempt and conspiracy section that incorporated by reference the sentencing provisions set out in the substantive offense sections; 4) a separate sentencing section that fixed punishments for both substantive offenses and attempts and conspiracies. Quite apparently, neither the first nor the fourth approach was adopted. Nor was the second, suggestions in petitioner's brief to the contrary (Pet. Br. 13-14) notwithstanding. Had it been, a judge could impose a sentence for drug conspiracy, relying solely on Section 846. That cannot be done as the statute is drafted. Absent reference to the substantive offense sections, the phrase "imprisonment or fine or both," upon which so much of petitioner's argument hangs, has no meaning. Thus, there can be no question that Congress meant

to incorporate by reference the sentencing provisions of the substantive offense sections. Nor is there anything about the structure of the Act that affords any basis for concluding that Congress intended to incorporate some punishment provisions but not others.

There is no merit to petitioner's contention (Pet. Br. 20-21, 31-32) that the express reference to special parole in Section 845 demonstrates a congressional intent to exclude that punishment from those available under Section 846. Unlike Section 846, Section 845 does not simply assimilate the penalty structure set forth in Section 841. Instead, under Section 845 fines and imprisonment of *up to* twice that authorized by Section 841(b) *may be* imposed for a first distribution to a minor, whereas special parole of *at least* twice the term authorized by Section 841(b) *must be* imposed.[9] In other words, even if a trial judge elects to limit the incarceration for a Section 845 offense to that authorized for one who distributes to an adult, he or she must at least double the special parole. It was therefore necessary in drafting Section 845 to treat the special parole aspect of imprisonment separately to make clear that regardless of whether incarceration is actually incremented as authorized, incrementation of special parole is mandatory. Given

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[9] Similarly, for repeat offenders under Section 845, fines and imprisonment of up to three times that authorized by Section 841(b) may be imposed and a special parole term of at least three times the term otherwise authorized must be imposed.

this dissimilarity in the sentencing schemes, the fact that special parole is expressly treated in Section 845 and not in Section 846 does not detract from the view that Section 846 incorporates special parole by necessary implication.

Even as a matter of simple linguistic analysis, however, the term "imprisonment" can and should be read as necessarily encompassing special parole. Special parole may never be imposed without imprisonment; conversely, imprisonment cannot be imposed without special parole. Thus special parole must always accompany imprisonment and is a mandatory adjunct of it. Consequently, like several of its sister circuits, the court below bottomed its decision on the view that Section 846's incorporation by reference of the imprisonment provisions of Section 841 effected an incorporation of both the incarceration and the special parole components of that section.

> From the wording in § 841(b)-(c), it would appear that Congress viewed the special parole term as being part of the term of imprisonment to which it is appended. * * *. It is impossible, therefore, to accept the argument that the parole term is to be imposed only where the charge is in violation of the substantive provision. It is logical to view the reference to imprisonment in § 846 as intending to incorporate all of the imprisonment provisions in § 841(b).

A. 15-17, quoting *United States* v. *Jacobson, supra,* 578 F.2d at 868. Accord, *United States* v. *Sellers, supra,* 603 F.2d at 59; *United States* v. *Burman, supra,* 584 F.2d at 1358.

B. The Legislative History of the Drug Abuse Act Demonstrates That Congress Intended The Conspiracy Statute to Incorporate By Reference All of The Penalties Authorized For Object Offenses, Including Special Parole

Although more explicit draftsmanship might have mooted any question concerning the applicability of special parole to drug conspiracy offenses,[10] the legislative history of the Drug Abuse Act demonstrates that Congress fully intended that the sentences authorized for conspiracy and its object offenses would be coterminous, and that special parole would not be an exception.

1. At the outset, we note that in ascertaining congressional intent "the source in previous legislation of the particular provision in question" is a

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[10] This Court has not hesitated, in an appropriate case, to look beyond inexact draftsmanship to determine the fair meaning of a criminal statute.

> We are mindful of the maxim that penal statutes are to be strictly construed. And we would not hesitate, present any compelling reason, to apply it and accept the restricted interpretation. But no such reason is to be found here. The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

United States v. *Brown, supra,* 333 U.S. at 25-26 (citations omitted).

particularly helpful starting point. *United States* v. *Katz*, 271 U.S. 354, 357 (1926); see 2A J. Sutherland, *supra*, § 48.03 at 191. Prior to enactment of the Drug Abuse Act, federal drug laws were split between two separate titles of the United States Code. The Internal Revenue Code of 1954 established a structure regulating the taxation and dispensation of narcotics and marijuana, prohibiting purchase, sale, distribution and possession of the substances in violation of the taxation scheme. See 26 U.S.C. (1964 ed.) 4701-4705, 4742-4744, 7237. The Federal Food, Drug, and Cosmetic Act proscribed unauthorized manufacture, compounding, sale, delivery and possession of depressant or stimulant drugs. See 21 U.S.C. (1964 ed. Supp V) 331-333, 360a. And the Narcotic Drugs Import and Export Act prohibited the importation of narcotics and marijuana and the sale of heroin to juveniles. See 21 U.S.C. (1964 ed.) 171-174, 176a, 176b. Significantly, both the Internal Revenue Code and the Narcotic Drugs Import and Export Act provided that persons who conspired to commit an offense in violation of substantive provisions would be subject to the same punishments as prescribed for persons who committed a substantive offense. 21 U.S.C. (1964 ed.) 174, 176a, 176b; 26 U.S.C. (1964 ed.) 7237(a), 7237(b); see also 18 U.S.C. (1964 ed.) 1403(a).[11] Thus, prior to enact-

[11] For example 26 U.S.C. (1964 ed.) 7237(b) provided, in pertinent part:

> Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. For a second or subsequent offense, the offender shall be imprisoned not less than 10 or more than 40 years and, in addition, may be fined not more than $20,000.

ment of the Drug Abuse Act, the sentencing scheme established by Congress provided for complete congruence between sentences for substantive violations of the drug laws and sentences for conspiracy to violate those laws.

That Congress never intended to depart from this congruence is apparent from the Drug Abuse Act's legislative history. In 1969, the administration introduced legislation in both houses to effect a comprehensive revision of federal drug laws. S. 2637, 91st Cong., 1st Sess. (1969);[12] H.R. 13742 and 13743, 91st Cong., 1st Sess. (1969).[13] The express objectives of the bills included consolidation of existing drug legislation into a rational, coherent scheme, elimination of inconsistencies and inadequacies in ex-

[12] S. 2637 was designated the Controlled Dangerous Substances Act of 1969.

[13] The drug legislation transmitted to the House was divided into two bills. H.R. 13742, titled the Controlled Narcotic Drug Act of 1969, governed narcotic drugs and marijuana and was referred to the Committee on Ways and Means, since narcotic and marijuana abuse previously had been covered by the tax law. H.R. 13743, titled the Controlled Depressant And Stimulant Drugs Act of 1969, covered drugs previously regulated by the Federal Food, Drug and Cosmetic Act and was referred to the Committee on Interstate and Foreign Commerce. See H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., Pt. 1, 1-2 (1970).

isting law, and formulation of a more realistic sentencing structure. H.R. Doc. No. 91-138, 91st Cong., 1st Sess. (1969); *Narcotic Legislation: Hearings on S. 1895, S. 2590, and S. 2637 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 210-213 (1969) (hereinafter "S. 2637 Hearings"). During the same period, Senator Dodd introduced legislation that had the same principal features as the administration's bill. See S. 1895, 91st Cong., 1st Sess. (1969).[14]

The concept of special parole did not appear in any of these initial proposals. They provided only that substantive violations would be punished by imprisonment or fine or both. The sole significant variation in the sentencing provisions of the various bills was that Senator Dodd's proposal, S. 1895, eliminated mandatory minimum sentences for trafficking offenses. Each bill contained a provision identical to that now in Section 846—that conspiracy would be punishable by imprisonment or fine or both, not exceeding the maximum punishment prescribed for the object offense. See S. 2637, *supra*, § 504; S. 1895, *supra*, § 704; H.R. 13742, *supra*, § 504; H.R. 13743, *supra*, § 504.[15] It was clear that the drafters of each

[14] S. 1895 was titled the Omnibus Narcotic and Dangerous Drug Control and Addict Rehabilitation Act of 1969.

[15] The only distinction between these sections was that S. 1895 provided that the penalty for conspiracy would not exceed the maximum punishment for the object offense, but that the penalty for attempt would be limited to one-half the maximum punishment. The other sections provided that the penalty for both attempt and conspiracy would be the same as that authorized for the object offense.

of these bills intended to perpetuate the scheme for punishing drug conspiracy offenses that had existed under prior law—the penalty for conspiracy would be identical to the penalty for the object offense.

2. The circumstances under which special parole became a part of the Act indicate that Congress intended to maintain this congruence in sentencing structure. As the result of consultations between the Attorney General and the Senate Subcommittee to Investigate Juvenile Delinquency,[16] John Ingersoll, Director of the Bureau of Narcotics and Dangerous Drugs, presented to the subcommittee three different schemes for penalizing substantive violations of the proposed Act.[17] Each of the options included a special

[16] During the testimony of the Attorney General before the subcommittee, the administration's bill was criticized because of the severity of sentences authorized for casual distribution of controlled substances to minors and the retention of mandatory minimum penalties. The Attorney General agreed to review the proposal's penalty structure with the subcommittee's staff and to make additional recommendations after considering the views presented during subsequent testimony. S. 2637 Hearings at 255.

[17] The thrust of each of these options was to accord sentencing judges more flexibility in sentencing first offenders, casual distributors, and addicts, while permitting judges to treat professional traffickers with severity. See S. 2637 Hearings at 670-675, 678-682; see also *Drug Abuse Control Amendments—1970: Hearings on H.R. 11701 and H.R. 13743 Before the Subcomm. on Public Health and Welfare of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 90-91 (1970) (chart) (hereinafter "H.R. 13743 Hearings").

parole term as part of the sentencing structure for trafficking offenses. As Ingersoll explained to the subcommittee (S. 2637 Hearings at 676):

> [W]e have required a special parole term so that persons sentenced for trafficking violations would be placed under supervision for a period of time regardless of whether they are incarcerated or their sentence probated or suspended. The intent here is to give the judges another tool for sentencing and another means for protecting society when dealing with the drug violator.

The Justice Department's proposal concerning special parole met with the subcommittee's approval. Accordingly, the legislation as formulated by the subcommittee and reported out by the full committee, S. 3246, followed the basic language and structure of the bills originally considered by the subcommittee, but was modified to include terms of special parole "[i]n addition to any term of imprisonment" for the most serious substantive offenses. S. 3246, 91st Cong., 2d Sess., § 501(c)(1)(2) (1970).[18]

In modifying the substantive offense sections to accommodate the concept of special parole, the subcommittee neglected to effect a conforming change in the conspiracy section. Consequently, that section continued simply to provide that "[a]ny person who

[18] In addition, S. 3246 eliminated mandatory minimum penalties for all offenders except professional criminals involved in major distribution and importation of controlled substances (S. Rep. No. 91-613, 91st Cong., 1st Sess. 1 (1969)).

* * * conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy." S. 3246, *supra*, § 504. The bill was approved by the full committee and passed by the Senate in this form. 116 Cong. Rec. 1671 (1970).[19]

That the conspiracy section of S. 3246 was viewed as preserving the traditional sentencing congruence between conspiracy and substantive drug offenses was made clear when the administration's proposal was considered in the House of Representatives. Follow-

[19] During the Senate floor debates on S. 3246, discussion of the sentencing provisions contained in Title V of the bill focused exclusively upon new features eliminating mandatory minimum sentences for most offenses, doubling the penalty for sale of narcotics to minors, and imposing a separate scheme of penalties for continuing criminal enterprises. See 116 Cong. Rec. 996, 1181-1182, 1664-1665 (1970). While Senator Dodd, the floor manager of S. 3246, as well as Senators Hruska and Thurmond, members of the Judiciary Committee, briefly mentioned that special parole was authorized for trafficking offenses, there was no discussion of whether this penalty also was applicable to conspiracy offenses. Indeed, the conspiracy section was not even addressed during the debates. See 116 Cong. 996, 1182, 1665 (1970).

However, Senator Dodd introduced a chart comparing the penalty structure of S. 3246 with the penalty structure under existing drug legislation. The chart suggested that the penalty scheme for conspiracy offenses under S. 3246 was intended to parallel the scheme under existing law in that the maximum punishment authorized for conspiracy would be determined by the maximum punishment prescribed for the target offense. 116 Cong. Rec. 1653-1654 (1970).

ing passage of S. 3246 by the Senate, the administration introduced new legislation in the House containing identical features. H.R. 17463, 91st Cong., 2d Sess. (1970). See *Controlled Dangerous Substances, Narcotics and Drug Control Laws: Hearings on H.R. 17463 Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 200 (1970) (hereinafter "H.R. 17463 Hearings"). During the hearings on H.R. 17463 before the Ways and Means Committee, BNDD Director Ingersoll, who previously had introduced the concept of special parole in the Senate, submitted a section by section analysis of the bill. After describing the various trafficking offenses for which special parole was authorized, Ingersoll explained that the sentencing scheme contemplated that conspiracy was to be punished to the same extent as object offenses, without exception:

> This section provides that a person may be punished for endeavoring or conspiring to commit an offense under this Act. *Upon conviction, his sentence may not exceed the punishment prescribed for the offense which was the object of the attempt or the conspiracy.*

H.R. 17463 Hearings at 223 (emphasis supplied). Thus, although the bill provided that conspiracy "is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for committing the [object] offense * * *" (S. 3246, *supra*, § 504), that language was viewed by the legislation's formulators not as limiting conspiracy sentences to fines and imprisonment, but rather as incorporating the maximum punishments authorized for object offenses.

This construction was not questioned at any time during the House hearings on the administration's bill. Following Ingersoll's testimony, the Ways and Means Committee received the Interstate and Foreign Commerce Committee's staff revision of the original bill.[20] Although the Interstate and Foreign Commerce Committee draft (H.R. 18583, 91st Cong., 2d Sess. (1970)) included a number of improvements and revisions not pertinent here, it retained the sentencing structure of both S. 3246 and H.R. 17463. Thus, while the authorized penalties differed in some respects from those contained in H.R. 17463,[21] H.R.

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[20] Prior to Ingersoll's presentation to the Ways and Means Committee, a Justice Department representative explained the sentencing structure adopted by the Senate in S. 3246 to a subcommittee of the Committee on Interstate and Foreign Commerce which was then conducting hearings on the initial administration proposal. See H.R. 13743 Hearings at 89-91. This testimony resulted in incorporation of the new sentencing structure in the version of the bill ultimately proposed by that committee. See H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., Pt. 1, 1-2 (1970).

[21] The new House bill removed the provisions relating to importation and exportation of controlled substances from the section prohibiting manufacture and distribution and placed them under a separate title designated the "Controlled Substances Import and Export Act." See H.R. 18583, *supra*, Title III, §§ 1000-1014. Compare S. 3246, *supra*, § 501(a) and H.R. 17463, *supra*, § 501(a) with H.R. 18583, *supra*, § 401(a). This revision was necessary because jurisdiction over the bill in the House was divided between two committees. The Interstate and Foreign Commerce Committee was responsible for

18583 perpetuated the scheme of its antecedents and made special parole mandatory whenever imprisonment was imposed for a serious trafficking offense.[22]

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and had jurisdiction over the trafficking, sale and distribution offenses contained in Title II while the Ways and Means Committee was responsible for importation and exportation offenses. See H.R. Rep. No. 91-1444, *supra*, at 1-3, 71-72.

Title III of the bill preserved the sentencing scheme for importation and exportation offenses that had existed in its antecedents, § 501(a) of S. 3246 and H.R. 17463. Thus, it required a special parole term whenever imprisonment was imposed for importation or exportation of narcotics or controlled substances listed in Schedules I through IV. It also included a conspiracy section identical to that contained in § 504 of S. 3246 and H.R. 17463. See H.R. 18583 §§ 1010, 1013. These importation and exportation sections are now codified as 21 U.S.C. 960, 963.

In addition to this modification in structure, the new House bill imposed lengthier terms of imprisonment for offenses involving Schedule I and Schedule II controlled substances. Compare §§ 401(b)(1)(A) and 401(b)(2) of H.R. 18583 with §§ 501(c)(1) and 501(c)(3) of S. 3246 and H.R. 17463. Finally, H.R. 18583 established five schedules of controlled substances whereas its precursors established four. Compare § 202 of H.R. 18583 with § 202 of S. 3246 and H.R. 17463.

[22] Whereas S.3246 and H.R. 17463 provided that "a special parole term *imposed under this Act* may be revoked if its terms and conditions are violated" (§ 501(d)), H.R. 18583 provided that "a special parole term *imposed under this section* [Section 401, the precursor of 21 U.S.C. 841] *or section 405* [the precursor of 21 U.S.C. 845] may be revoked if its terms and conditions are violated" (§ 401(c)) (emphasis supplied). Petitioner argues (Pet. Br. 30-31) that this change from a general reference to the Act to a specific reference to two sections of the Act demonstrates that Congress did not intend for special parole to be imposed under the conspiracy section as well. However, there is nothing in the legislative history to support the view that this language change was

Additionally, it retained its precursors' sentencing formula for conspiracy by incorporating by reference the sentences authorized for object offenses.

> [Conspiracy] is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the * * * conspiracy.

H.R. 18583, *supra*, § 406. This version of the legislation ultimately was adopted by both houses, signed by the President, and enacted into law as Pub. L. No. 91-513, 84 Stat. 1236. See 116 Cong. Rec. 30667, 35559, 37439 (1970). While there was brief discussion of some of the penalty provisions during the House and Senate floor debate on the final bill, the sentencing features of the conspiracy section were never mentioned. Thus, at no point was BNDD Director Ingersoll's view that the provision maintained the original complete congruence between sentences for conspiracy and object offenses ever drawn into question. See *e.g.*, 116 Cong. Rec. 33624-33634, 35052 (1970).[23]

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intended to narrow the applicability of special parole. Rather, it is most likely that the drafters of S.18583 simply looked to see what sections of the proposed bill used the term special parole, and inserted those section numbers into Section 401(c). As noted in the text, although the conspiracy section (§ 406) did not include the term special parole, it did incorporate the sentencing provisions of, *inter alia*, Section 401.

[23] There is no merit to petitioner's argument (Pet. Br. 32-33) that by expressly referring to special parole in the repeat offender sections (§ 508) of H.R. 17463 and S. 3246, Congress

3. Even absent the testimony of the administration's chief spokesman for the bill, Congress's broad objectives in enacting the penalty provisions of this legislation render it unreasonable to ascribe to it the intent to authorize special parole for isolated substantive offenses while withholding this major sentencing tool for conspiracy offenses.

The legislative history of the sentencing provisions clearly reflects Congress's desire to maximize the trial judge's flexibility in imposing sentences so that penalties might be tailored to fit individual offenders. See page 22 & note 17, *supra*. The elimination of mandatory minimum terms of incarceration, except where persons have engaged in a continuing criminal enterprise, and the keying of maximum fines and terms of imprisonment to the type of transactions entered into and the nature of the substance involved, were designed to permit judges to differentiate among addicts, first offenders, casual distributors and major

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implicitly demonstrated that it did not intend this penalty to extend to the conspiracy section. As we explained in the context of offenses involving distribution to minors (*supra*, pages 15-16), express reference to special parole was necessitated by the peculiar sentencing structure these bills adopted for second offenders. While the second offender provisions of these bills permitted courts to impose imprisonment up to twice that authorized for a first offender, it made mandatory a special parole term at least twice that authorized for a first offender whenever the court imposed confinement, regardless of its duration. Hence, as with offenses involving distribution to minors, express reference to special parole was necessary to make it clear that while doubled confinement was optional for second offenders, a doubled minimum term of special parole was mandatory.

traffickers. See, *e.g.*, 116 Cong. Rec. 1664, 33313-33314, 35052 (1970); H.R. Rep. No. 91-1444, *supra*, at 10-11. At the same time, the sentencing scheme was intended to deter professional criminals from engaging in trafficking drugs for profit. See, *e.g.*, 116 Cong. Rec. 1664, 35052 (1970); H.R. Rep. No. 91-1444, *supra*, at 10; S. Rep. No. 91-613, *supra*, at 7. Thus, the penalty structure established stringent sanctions, including lengthy terms of imprisonment and heavy fines for trafficking offenses, and in addition, required a mandatory minimum term of imprisonment without probation or suspension for engaging in a continuing criminal enterprise.

The concept of special parole was introduced to further similar ends. This new form of penalty was intended to foster rehabilitation through supervised community release. See S. 2637 Hearings at 676. At the same time, special parole was seen as a powerful disincentive to repetition of drug trafficking inasmuch as parole revocation would result in a further period of imprisonment equal in length to the special parole term, undiminished by time actually spent on parole prior to the violation. 21 U.S.C. 841(c). See *Bunker* v. *Wise*, 550 F.2d 1155, 1159 (9th Cir. 1977). Since the Act specifies only the minimum parole term, sentencing judges would be free in each case to impose whatever term they deem appropriate. See *Yothers* v. *United States*, 572 F.2d 1326, 1328 (9th Cir. 1978); *Bunker* v. *Wise*, *supra*, 550 F.2d at 1159; *Johnson* v. *United States*, 539 F.2d 1241, 1244 (9th Cir. 1976), cert. denied, 431 U.S. 918 (1977).

In view of these goals, it is simply inconceivable that Congress intended to withhold special parole as a means of penalizing those convicted of drug conspiracies. Petitioner has pointed to no reason why Congress would consider special parole a needed and appropriate response to substantive drug offenses, which might involve an isolated transaction by a single individual, yet would discard the same remedy for those who join together conspiratorially to accomplish the same end.[24] Concerted drug trafficking presents at least as great a threat to the community as specific acts of distribution,[25] and special parole is

[24] Petitioner argues (Pet. Br. 36-37) that Section 846 conspiracies need not be punishable by special parole where the object offense carries that penalty since "the most dangerous conspiracies" can be punished as continuing criminal enterprises under Section 848, and the persons involved in them can be sentenced as dangerous special drug offenders under Section 849. However, a person cannot be convicted of engaging in a continuing criminal enterprise unless he or she commits a drug offense that is "part of a continuing series of" such offenses, does so in concert with at least five other persons, occupies "a position of * * * management" vis-a-vis the others, and derives substantial income or resources from the enterprise. 21 U.S.C. 848(b). Similarly rigorous requirements must be satisfied before a person can be sentenced as a dangerous special drug offender. 21 U.S.C. 849(e) and (f). Given the resultant difficulty in obtaining convictions under these statutes as well as the far more severe sanctions imposed upon conviction, it is unreasonable to ascribe to Congress the intention to deny judges the authority to fix appropriate sentences for conspirators under Section 846.

[25] As this Court has recognized:

> [C]ollective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish.

Iannelli v. *United States*, 420 U.S. 770, 778 (1975), quoting *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961).

plainly every bit as appropriate in dealing with persons convicted of conspiracy as with substantive violators. In short, it defies logic, reason and experience to conclude, absent at least some evidence, that Congress intended the result urged by petitioner.[26]

[26] Petitioner contends (Pet. Br. 38-39) that Section 846 must be construed to preclude imposition of special parole in accordance with the doctrine that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Culbert*, 435 U.S. 371, 379 (1978), citing *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See *Simpson* v. *United States*, 435 U.S. 6, 14-15 (1978). But, as this Court noted in *United States* v. *Culbert*, *supra*, 435 U.S. at 379, the rule of lenity only applies when the statute is genuinely ambiguous, or uncertainty exists as to Congress's intent. See also *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7. Thus, the rule of lenity is not implicated here. As we have shown, the Drug Abuse Act is plainly structured to incorporate by reference special parole as a penalty for conspiracy whenever it is authorized for the object offense. Moreover, the legislative history of the Act shows that Congress intended complete congruity between the penalties for conspiracy and the object offense.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In this brief, reply is made to seven matters advanced in the Brief for the United States. Points 1 through 4 pertain to arguments in Section A of the Government's brief (Res. Br. at 8-16); Points 5 through 7 pertain to arguments in Section B of the Government's brief (Res. Br. at 17-31). Page references to the Government's brief with respect to the arguments in issue are provided within each point.

1.

The Government seeks to establish that, under the statutory scheme, the inclusion of a special parole term

follows from the seriousness of the particular substantive offense. The Government thus avers: "Of the nine separate offenses, the four most serious mandate imposition of a special parole term whenever imprisonment is imposed." Res. Br. at 12. However, the correlation between provision of a special parole term and the seriousness of an offense does not exist because the specified offenses are not the subchapter's four most serious offenses.

First, the Government removes from consideration 21 U.S.C. §848, defining the crime of continuing criminal enterprise, the most serious of all the drug offenses, though this section is within the same statutory grouping as the sections examined by the Government (21 U.S.C., chap. 13, Subchap. I, Part D; see Pet. Br. at 16-19 (chart) and at 16 note 17). The Government's distinction (Res. Br. at 12 note 7) that §848 imposes "a wholly different, and more severe, sentencing scheme" is a reason for including §848 within — and not eliminating it from — an analysis of the nature and severity of the sentences authorized in the drug abuse sections.

Further, even if §848 is not considered in defining the most serious drug offenses and examination is restricted to §§841-844 as the Government wishes, the conclusion that the four specified offenses are the most serious remains inaccurate. 21 U.S.C. §841(d) carries imprisonment and fine punishments as severe as two of the Government's four "most serious offenses," and 21 U.S.C. §843 carries imprisonment and fine punishments more severe than one of the four offenses specified by the Government. Section 841(d) and §843, neither of which the Government addresses, do not include special parole provisions.

Thus, the Government's contention that "the four most serious [offenses] mandate imposition of a special parole

term whenever imprisonment is imposed" is incorrect. The most that may be said in favor of the Government's position is that four of the seven most serious offenses mandate the imposition of a special parole term whenever imprisonment is imposed.* The absence of correlation precludes support for the argument that seriousness of the offense in and of itself is grounds for inclusion of special parole in conjunction with imprisonment.

2.

The Government formulates four "basic approaches" to attempts and conspiracies which could have been adopted by Congress, and then seeks to establish, by eliminating options "1", "2", and "4", that option "3" — "a separate attempt and conspiracy section that incorporate[s] by reference the sentencing provisions set out in the substantive offense sections" (Res. Br. at 14) — is the approach which was adopted by Congress.

The Government's four approaches do not exhaust the possibilities; there is a fifth approach which the Government has ignored: a separate attempt and conspiracy section that defines the type of punishment authorized but obtains the limits for such punishment by reference to a related substantive offense section. This scheme is quite different from that of the Government's option "2" — "a separate attempt and conspiracy section that include[s] its own sentencing provisions" — which the Government mistakenly attributes to our brief. Res. Br. at 14. We fully

*Thus, it may also be said that three of the six most serious offenses do not mandate imposition of special parole, or that seven of the twelve offenses which carry possible sentences of imprisonment do not provide for special parole.

agree with the Government that option "2" does not accurately describe §846, because option "2" entails a total self-sufficiency not present in §846. The same defect is not in evidence in the described fifth approach, which is the approach we actually have advanced. See Pet. Br. at 13-14. As we show in our main brief, this provides the most accurate description of the approach taken by Congress in §846.

3.

Congress' addition of the special parole clause to H.R. 18583, §405 (corresponding to 21 U.S.C. §845) is among the most cogent points favoring our position that, by not amending §846, Congress intended to prescribe only imprisonment and fine as sentencing alternatives. The Government responds that a separate special parole clause in §845 was necessitated by a concern not applicable to §846: "to make clear that regardless of whether incarceration is actually incremented as authorized, incrementation of special parole is mandatory." Res. Br. at 15.* Contrary to the Government's claim, §845's separate special parole clause was not necessary for this purpose, for a general doubling would have effected the same result.

The length of a special parole term is set in accordance with a stated minimum term which is mandatory. The doubling of that term would mandate that twice the stated

*The Government's contention, and our comments in reply, are equally applicable to the second offender provisions (see Pet. Br. at 32) which, like §845, were amended after the introduction of special parole in the substantive offense sections specifically to include special parole.

term be imposed. This is in distinction to imprisonment terms, which are specified as permissible maximums without mandatory minimums which, when doubled, are still free of mandatory minimums. Thus, mandatory incrementation of special parole in conjunction with permissible incrementation of imprisonment is implicit in the definition of special parole and imprisonment, and a separate special parole clause in §845 was not needed to communicate this requirement. If, as the Government claims, an imprisonment provision referenced to another section — as is found in both §845 and §846 — incorporates special parole as well, there was no point in Congress' amending §845 (in H.R. 18583, §405) by adding a separate special parole clause.

This establishes that Congress added the special parole clause to §845 — as it did to the various second offender provisions in those sections containing such requirements — because it wished to make special parole, in addition to the already specified imprisonment and fine, a part of a §845 sentence. It is thus apparent that Congress viewed §845 without a special parole clause as not providing for special parole, and that by failing to add a special parole clause to §846, Congress would be allowing that section to function precisely as it had prior to the introduction of special parole: as referenced exclusively to the imprisonment and fine provisions of an associated substantive section.

4.

The Government seeks to find authorization for special parole in §846 in the term "imprisonment," and advances the following argument: "Special parole may never be imposed without imprisonment; conversely, imprisonment cannot be imposed without special parole." Res. Br. at 16.

Such converse reasoning does not work here because special parole and imprisonment have not, in the drug abuse sections, been made conditional on each other. Whereas special parole is conditional upon imprisonment, our chart (Pet. Br. at 16-19) reflects that imprisonment is quite independent of special parole, and is often imposed alone. Thus, a major premise of the Government's "imprisonment" argument — that "imprisonment cannot be imposed without special parole" — is false, and the argument must fail.

5.

The Government, in its analysis of the statutory history, seeks to show that Congress intended to retain a "congruence" between the penalty for conspiracy and that for the object offense. The Government argues that the original drug bills of the Ninety-first Congress sought to perpetuate the congruence found in the former law. Res. Br. at 17-21. The Government then argues that in the later bills which included the special parole amendments, Congress intended to retain the congruence found in the earlier bills. Res. Br. at 21-27.

(a) The Ninety-first Congress, in its early bills to amend the drug laws, designed a penalty structure which departed dramatically from the former law. As the Government acknowledges, "[t]he express objectives of the [early] bills included consolidation of existing drug legislation into a rational, coherent scheme, elimination of inconsistencies and inadequacies in the existing law, and formulation of a more realistic sentencing structure." Res. Br. at 19-20. Among the changes were the removal of conspiracy from the substantive offense sections where it had been in the various sections of the former law (see 21 U.S.C. (1964 ed.) former

§§174, 176a, 176b; 26 U.S.C. (1964 ed.) former §§7237(a), 7237(b)), and the establishment of a separate section with its own sentencing authority for conspiracy and attempt.

By creating this new section, Congress eliminated the necessity of congruence which had existed under the former law's single-section approach; moreover, as noted in our main brief (Pet. Br. at 13), Congress cast this new section in language ("which may not exceed") which, though allowing for equal punishments, does not demonstrate an intention that there must exist a congruence between the punishments for conspiracy and substantive offenses. Prior to the introduction of the special parole concept, the legislators chose to establish a penalty structure in which the type of punishment for conspiracy would be identical to that of a related substantive act. But as is evident from the considerable change vis a vis the former law, this was a fresh determination, not one compelled by an outmoded structure, and changes in this initial formulation as the various bills underwent examination and amendment were a natural evolution conforming to Congress' intent to reevaluate. Proof that the bill ultimately enacted was intended to establish congruence, therefore, must rest not on the express congruence of the former law nor on the congruence of the early bills but on evidence that, after the special parole amendments, Congress intended that the punishments provided under §846 and the amended substantive offense sections be congruent.

(b) The Government's sole proof on this last point is a statement of Bureau of Narcotics and Dangerous Drugs Director John Ingersoll to the House Committee on Ways and Means during the Committee's hearings on H.R. 13742 and 17463: "Upon conviction [for conspiracy], his sentence

may not exceed the punishment prescribed for the offense which was the object of the . . . conspiracy." Res. Br. at 24.

Mr. Ingersoll's statement reflects the phraseology found in the second clause of H.R. 17463, §504, and now identically in 21 U.S.C. §846: "which may not exceed the maximum punishment prescribed for the [object] offense." This suggests that Mr. Ingersoll merely deleted the first clause of the very section from which he was reading, in which the antecedent qualifiers — "imprisonment or fine or both" — appear. See Pet. Br. at 12. That Mr. Ingersoll's omission was unintentional is evident from the fact that, in the prepared Justice Department statement to which the oral testimony pertained, a chart (see Pet. Addendum III) showed that conspiracy was not subject to special parole (see Pet. Br. at 28 and Pet. Addendum at III-3) and stated that "H.R. 17463 provides that any person who endeavors or conspires to commit any offense under the act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment prescribed for committing the offense" (see Pet. Addendum at III-3 note 6). Similarly, in his testimony before the House Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce several months earlier (see Pet. Br. at 27-28), Mr. Ingersoll described the punishment applicable to conspiracy in the three Justice Department sentencing alternatives (all providing for special parole in several substantive sections) as being "imprisonment and/or fine." In the absence of an express repudiation by Mr. Ingersoll in his testimony before the Committee on Ways and Means of the statutory language of the bill or of the entries on the chart, and indeed, in the absence of a specific statement by Mr. Ingersoll that H.R. 17463, §504 was to include the new special parole provision of which he had just been speaking,

the Government's attribution to him of the view that special parole applied to conspiracy (see Res. Br. at 24-25) is speculative.

Moreover, even were it assumed that Mr. Ingersoll shared that view at the time of his testimony, this would not prove determinative on the question of Congress' intent. As just noted, members of Congress were advised by Mr. Ingersoll more than once that the applicable punishment for conspiracy was imprisonment and/or fine; and other information, such as Senator Dodd's chart accompanying S. 3246 (see Pet. Br. at 26-27; Pet. Addendum II) and H.R. Rep. No. 91-1444 accompanying H.R. 18583 (see Pet. Br. at 29 and notes 45 and 46), provided Congress with a sound basis for believing that the conspiracy sections of the bills preceding the Comprehensive Act, all worded identically to 21 U.S.C. §846, provided for punishment consisting exclusively of imprisonment and/or fine. Had it been Congress' intent to include an additional punishment of special parole for conspiracy, it was clearly on notice that the statutory language of the conspiracy sections had to be amended. Instead, Congress declined every opportunity to amend these sections — S. 3246, §504; H.R. 17463, §504; H.R. 18583, §406 — after the introduction of special parole; while other sections were changed by adding specific special parole clauses, the punishment for conspiracy remained "imprisonment or fine or both."

Thus, there is no proof that Congress either believed or desired that congruence would be a feature of the new sentencing structure.

6.

The Government asks this Court to employ "logic, reason and experience" to ascertain what Congress, were it attentive to its duty, would have intended. The Government states:

> In view of these goals [related to sentencing], it is simply inconceivable that Congress intended to withhold special parole as a means of penalizing those convicted of drug conspiracies. Petitioner has pointed to no reason why Congress would consider special parole a needed and appropriate response to substantive drug offenses . . yet would discard the same remedy for those who join together conspiratorially to accomplish the same end. . . . [S]pecial parole is plainly every bit as appropriate in dealing with persons convicted of conspiracy as with substantive violators. In short, it defies logic, reason and experience to conclude, absent at least some evidence, that Congress intended the result urged by petitioner. [Footnotes omitted. Res. Br. at 30-31.]

The heralds of this argument appear in earlier portions of the Government's brief: Congress' failure to add a special parole clause to §846 was "inadvertent" (Res. Br. at 7); the absence of a special parole clause is rooted in Congress' failure to utilize "more explicit draftsmanship" (Res. Br. at 17); and Congress, after adopting special parole clauses in various sections, merely "neglected to effect a conforming change in the conspiracy section" (Res. Br. at 22).

The questions of why Congress elected the sentencing structure reflected in the statute and whether the absence of special parole from a §846 sentence results in a better or a worse structure reach beyond the task of interpreting the statute as written. To accept the Government's invitation to find Congress' intent by hypothesizing what is "inconceivable" or "inadvertent" would invite requests to analyze other statutes not as to what Congress did but as to what it might have done. It is, for example, no less a question of "logic, reason and experience" why special parole should be applicable to some substantive drug offenses but not to others (including the most serious drug trafficking offense, §848) or why, in other parts of the United States Code, sentence parity exists with respect to some conspiracy and related substantive sections but not with respect to others. This Court, in its wisdom, might well be able to redraft legislation so that consistency is better served. In doing so, however, it might well distort what Congress actually intended. To hold petitioner to proof of a "reason why" Congress did what it did before giving effect to the statute as written would involve the Court in the kind of judicial legislating Justices Brandeis and Frankfurter counseled against. See Pet. Br. at 37.

7.

The Government confronts our lenity argument in a footnote. Res. Br. at 31 note 26. Nonetheless, the significance of this doctrine to the case *sub judice* is confirmed by several of the Government's own arguments. As just noted, the Government has described Congress' failure to place a special parole clause in §846 as an oversight which does not truly reflect Congress' intent. If, notwithstanding the evidence that Congress acted intentionally, this Court is convinced that the absence of a special parole clause in §846 may have been inadvertent, there can be only speculation as to Congress' intent. Inadvertence is not an act which discloses an underlying intent with any degree of

certainty, but a non-act which leaves intent uncertain. As the Government acknowledges (Res. Br. at 31 note 26), the rule of lenity applies when "uncertainty exists as to Congress's intent."

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for petitioner, the judgment of the court of appeals should be reversed and the case remanded with instructions to vacate petitioner's special parole term as unlawfully imposed under §846.

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